(1) Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CBS, INC.; WESTINGHOUSE PENSION PLAN,
Petitioners,

v.

HARRY BELLAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether section 204(g) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), applies to shutdown or other unpredictable contingent-event benefits such as the Permanent Job Separation benefit at issue in this case.

PARTIES TO THE PROCEEDINGS

All parties in the courts below are listed in the caption. CBS Corporation (misidentified in the caption as "CBS, Inc.") has been merged into Viacom Inc. No publicly held companies hold 10% or more of Viacom's stock.

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PETITION FOR A WRIT OF CERTIORARI

CBS Corporation (misidentified in the caption as "CBS, Inc.") and the Westinghouse Pension Plan petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 221 F.3d 517. The opinion of the district court (Pet. App. 53a-76a) is reported at 73 F. Supp. 2d 500.

JURISDICTION

This district court had original jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(3). The court of appeals had appellate jurisdiction under 28 U.S.C. § 1292(b). The court of appeals entered its judgment on August 14, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of ERISA, 29 U.S.C. §§ 1001 *et seq.* (as amended), and the Internal Revenue Code, 26 U.S.C. §§ 1 *et seq.* (as amended), are set forth in the appendix. Pet. App. 77a-90a.

STATEMENT

Section 204(g) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), provides in pertinent part that an "early retirement benefit" or "retirement-type subsidy" cannot be reduced or eliminated by a pension plan amendment. This case presents the question whether section 204(g) applies to benefits that are contingent on an unpredictable event such as a shutdown or disability.

The Third Circuit held that section 204(g) does apply to such unpredictable contingent-event benefits, and does so even prior to the occurrence of the contingency. Pet. App. 30a.

The Third Circuit acknowledged a "split in authority" on this question among the federal courts of appeals (Pet. App. 14a), and it expressly rejected the contrary conclusions of the Sixth and Eleventh Circuits (Pet. App. 30a-31a). The Third Circuit also rejected the contrary conclusions of a published General Counsel Memorandum ("GCM") that constitutes the only available guidance from the Internal Revenue Service ("IRS"), the agency with express interpretive authority over section 204(g). Pet. App. 26a n.12, 32a-33a .

The court of appeals recognized that shutdown benefits have been "written into plans on the expectation that they could be modified or removed" before an actual shutdown, and that its decision would therefore defeat the expectations of plan sponsors who had "relied reasonably" on IRS guidance and IRS determination letters. Pet. App. 43a-44a. The court further recognized that its decision would produce "significant adverse tax consequences" for such plan sponsors "if relief from sources other than this court is not granted." Pet. App. 44a. The court even expressed its "hope that the appropriate authorities take note of this problem and take steps to alleviate it." *Id.*

1. Statutory and Regulatory Scheme

In 1974, Congress enacted ERISA, "an enormously complex and detailed statute," *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993), to comprehensively regulate employee benefit plans. Because its principal concern was that employees had been "losing anticipated retirement benefits" (29 U.S.C. § 1001(a)), Congress drew a fundamental distinction between a "pension" plan, defined in pertinent part as a plan "to the extent [it] . . . provides retirement income to employees" (*id.* § 1002(2)(A)), and a "welfare" plan, defined in pertinent part as a plan providing "benefits in the event of sickness, accident, disability, death, or unemployment" (*id.* § 1002(1)). Congress applied to "pension" plans a detailed series of accrual, vesting, and funding requirements (*id.* §§ 1051-1086), but it specifically

exempted "welfare" plans from these requirements (*id.* §§ 1051(1), 1081(a)(1)).

The accrual and vesting provisions of ERISA apply only to the "accrued benefit," defined in pertinent part as a benefit "expressed in the form of an annual benefit commencing at normal retirement age." *Id.* § 1002(23)(A). Nonetheless, ERISA expressly contemplates that the same plan may provide both the "accrued" pension benefit and a wide range of other benefits, including "welfare" benefits (*id.* § 1002(3)), the latter of which are described by statute as "ancillary" benefits "not directly related to retirement income" (26 U.S.C. § 415(b)(2)(B)). The legislative history of ERISA confirms that the term "accrued benefit" "does not apply to ancillary benefits, such as payment of medical expenses . . . or disability benefits . . . or to life insurance benefits payable as a lump sum." H.R. Conf. Rep. No. 93-1280, at 273 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5054.

As originally enacted, section 204(g) of ERISA provided that an "accrued benefit" could not be decreased by a pension plan amendment. 29 U.S.C. § 1054(g)(1). Imposing an identical rule for tax purposes, *see, e.g.*, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 (1981), section 411(d)(6) of the Internal Revenue Code ("IRC") also provided that an "accrued benefit" could not be decreased by a pension plan amendment. 26 U.S.C. § 411(d)(6)(A). Both provisions were limited to the "accrued benefit," because Congress specifically concluded that "[t]o require the vesting of . . . ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." H.R. Rep. No. 93-807, at 60 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726; S. Rep. No. 93-383, at 51 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4935.

Applying the definition of an "accrued benefit" as one "commencing" at normal retirement age, courts construed section 204(g), as originally enacted, to afford no protection to

"early retirement benefits" commencing before the normal retirement age. *See, e.g., Bencivenga v. Western Pa. Teamsters & Employers Pension Fund*, 763 F.2d 574, 577-78 (3d Cir. 1985); *Fine v. Semet*, 699 F.2d 1091, 1092-93 (11th Cir. 1983). Responding to these decisions, Congress enacted section 301 of the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, § 301, 98 Stat. 1426, 1450-51 (1984).

Specifically, REA amended section 204(g) of ERISA and section 411(d)(6) of the IRC to provide as follows:

> [A] plan amendment which has the effect of —
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

29 U.S.C. § 1054(g)(2); IRC § 411(d)(6)(B). As an example of a protected "early retirement benefit" or "retirement-type subsidy," the legislative history of REA cites a pension benefit provided prior to the normal retirement age to "employees who have completed 30 years of service." S. Rep. No. 98-575, at 28, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574. As examples of "ancillary benefits" still not protected by section 204(g), the legislative history cites "a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not

continue after retirement age)." *Id.* at 30, 1984 U.S.C.C.A.N. at 2576.

In 1987, Congress further revised this statutory scheme by enacting section 9303 of the Omnibus Budget Reconciliation Act of 1987 ("OBRA"), Pub. L. No. 100-203, § 9303, 101 Stat. 1330 (1987). OBRA amended the funding requirements of ERISA to specifically provide that "unpredictable contingent event benefits," defined as any benefit contingent on an event other than "age, service, compensation, death, or disability," or "an event which is reasonably and reliably predictable (as determined by the Secretary of the Treasury)," "shall not be taken into account," in determining a plan's current liability and concomitant funding obligations, "until the event on which the benefit is contingent occurs." 29 U.S.C. § 1082(d)(7)(B); IRC § 412(l)(7)(B). OBRA's legislative history confirms that the term "unpredictable contingent event benefits" includes "benefits that depend on contingencies that, like facility shutdowns or reductions or contractions in workforce, are not reliably or reasonably predictable." H.R. Conf. Rep. No. 100-495, at 855 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-601; *accord* S. Prt. No. 100-63, at 172 (1987); H.R. Rep. No. 100-391, pt. 2, at 987 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-604.

Acting pursuant to delegated authority, *see* 29 U.S.C. § 1202(c); Treas. Reg. § 301.7805-1(a), the IRS thereafter issued regulations that list a number of benefits that are not protected by section 204(g) of ERISA or section 411(d)(6) of the IRC. 26 C.F.R. § 1.411(d)-4. These unprotected benefits include, among other things, health insurance, accident insurance, and life insurance. *See id.* As explained by the IRS, however, the regulations do not specifically "address the extent to which a plant closing or shutdown benefit under a plan constitutes an early retirement benefit or a retirement-type subsidy." Treas. Dec. 8212, 53 Fed. Reg. 26,050, 26,051 (1988).

Accordingly, on April 6, 1992, the IRS issued General Counsel's Memorandum 39869 ("GCM 39869"), which addresses how section 204(g) of ERISA and section 411(d)(6) of the IRC apply to "shutdown benefits." GCM 39869 broadly defines "shutdown benefits" as "event-based benefits that become available to individuals upon the occurrence of an event that causes an individual's employment to change." Pet. App. 96a. It states that "short-term" shutdown benefits may not be provided through pension plans. Pet. App. 98a. It further states that long-term shutdown benefits are often "ancillary benefits" that may be provided through pension plans, but are not protected by section 204(g). Pet. App. 96a, 98a-99a & n.5. Finally, it states that long-term shutdown benefits that continue past normal retirement age can become "retirement-type subsidies" protected by section 204(g), but only upon the occurrence of the contingency. Pet. App. 101a-102a. The GCM explained at length that its analysis is, among other things, "consistent with the treatment of shutdown benefits as unpredictable contingent event benefits for purposes of the funding requirements" of OBRA. Pet. App. 101a.

2. The Westinghouse Pension Plan

Petitioner CBS (formerly known as Westinghouse Electric Corporation) sponsors and administers the Westinghouse Pension Plan. Pet. App. 2a. Section 4 of the Plan provided a normal retirement benefit. Pet. App. 4a-5a. Section 20 of the Plan provided additional shutdown benefits to employees who satisfied stated age and service requirements and who were "terminated as a result of a 'Permanent Job Separation.'" Pet. App. 3a. In particular, it provided a monthly payment "computed pursuant to section 4 of the Plan," but made available prior to the normal retirement age. Pet. App. 4a.

For a period prior to 1994, Westinghouse had expanded the definition of "Permanent Job Separation" to include, in pertinent part, the termination of an employee "through no fault of his own for lack of work for reasons associated with

the business." Pet. App. 5a. Pursuant to negotiations with its unions, in 1994, Westinghouse amended the Plan, effective January 1, 1997, to redefine a "Permanent Job Separation" as a termination "because of job movement or product-line relocation, or location closedown." Pet. App. 5a-7a. The same amendment also eliminated job separation benefits for terminations occurring on or after September 1, 1998. *Id.* The amendment was expressly conditioned on IRS approval. CA3 J.A. 118.

On March 31, 1995, Westinghouse requested a formal IRS determination, pursuant to Treas. Reg. § 601-201(a)(3), that the amendment satisfied all applicable requirements of the IRC. CA3 J.A. 232-35. After the IRS explicitly asked whether the amendment was permissible under section 411(d)(6) (CA3 J.A. 250), and after Westinghouse cited a pertinent judicial decision and GCM 39869 to the IRS (CA3 J.A. 258), the IRS issued a favorable determination letter. Pet. App. 26a n.12.

3. The Litigation Below

On December 31, 1997, Westinghouse terminated the employment of respondent Harry Bellas. Pet. App. 7a. In August 1998, respondent filed a putative class action in the district court, which had jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e)(1). Respondent alleged that he would have qualified for a shutdown benefit under the unamended Plan, and that the 1994 amendment violated section 204(g) of ERISA. Pet. App. 7a-8a. Respondent moved for partial summary judgment on that issue. Pet. App. 8a.

a. The district court held that a contingent job separation benefit is, even prior to the occurrence of job separation, a "retirement-type subsidy" protected by section 204(g). Pet. App. 69a-71a. The court rested this holding on the premise that section 204(g) makes no distinction "between 'contingent' and 'non-contingent' benefits." Pet. App. 71a. However, the court acknowledged conflicting "case law to support the

Plaintiff's and the Defendants' positions on this issue." Pet. App. 69a. The court further acknowledged that its conclusion "is not consistent with (and indeed is contrary to) the . . . IRS General Counsel Memorandum." Pet. App. 71a. *See also id.* ("I simply disagree with the IRS's analysis of the issue.").

b. At petitioners' request, the district court certified its ruling for an interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 51a-52a. As required by that provision, the court certified that its decision "involves a controlling question of law as to which there are substantial grounds for difference of opinion." Pet. App. 51a. The court of appeals agreed and accepted the appeal. Pet. App. 50a.

c. At the outset of its analysis, the court of appeals acknowledged that "the extension of section 204(g)'s coverage to benefits whose payment is contingent upon the occurrence of an unpredictable contingent event . . . has led to a split of authority." Pet. App. 13a-14a. Surveying this judicial and administrative conflict at length (Pet. App. 17a-29a), the Third Circuit reviewed cases holding that section 204(g) does *not* apply to contingent job separation benefits, including *Ross v. Pension Plan For Hourly Employees of SKF Industries Inc.*, 847 F.2d 329 (6th Cir. 1988), and *Roper v. Pullman Standard*, 859 F.2d 1472 (11th Cir. 1988) (per curiam), as well as conflicting cases such as *Harms v. Cavenham Forest Industries, Inc.*, 984 F.2d 686 (5th Cir. 1993), and *Richardson v. Pension Trust of Bethlehem Steel Corp.*, 67 F.3d 1462 (9th Cir. 1995), *vacated*, 91 F.3d 1312 (9th Cir. 1996), *on rehearing*, 112 F.3d 982 (9th Cir. 1997) (en banc). The court of appeals also discussed at length GCM 39869, which it understood as concluding that shutdown benefits, if provided beyond the normal retirement age, become protected by 204(g) "only upon the occurrence of the event that triggers the right to payment of the benefits (*i.e.*, the contingent event)." Pet. App. 28a.

After noting that "there does not appear to be any relevant distinction between plant shutdown benefits and a more broadly defined contingent event benefit," the court of appeals held that "contingent event benefits that continue beyond normal retirement age may be either early retirement benefits or retirement-type subsidies (or both) within the meaning of ERISA section 204(g)." Pet. App. 31a. The court further held that "[s]uch benefits are accrued upon their creation rather than upon the occurrence of the unpredictable contingent event." Pet. App. 30a. In reaching these conclusions, the Third Circuit expressly rejected not only *Ross* and *Roper* (Pet. App. 30a-31a) but also the GCM (Pet. App. 26a n.12, 32a-34a).

In its analysis, the court of appeals acknowledged that ERISA "does not specifically set forth the definition of early retirement benefit or retirement-type subsidy," but rather leaves these terms to be defined by regulation. Pet. App. 14a. Nonetheless, the court asserted that, in its view, shutdown benefits "are clearly retirement in nature." Pet. App. 34a. Furthermore, despite acknowledging that section 204(g) does not specifically address the appropriate treatment of contingent-event benefits (Pet. App. 32a-33a), the court asserted that, in its view, the occurrence of the contingency cannot affect the character of the benefit. Pet. App. 33a. And, despite acknowledging that "the concept of accrual connotes a benefit that accrues over time by reference to an employee's age, service, and years of participation," the court asserted that shutdown and other contingent benefits do "accrue" in this sense. Pet. App. 34a.

The court of appeals also claimed support from a perceived "suggest[ion]" (Pet. App. 30a) in three individual sentences in REA's legislative history. Pet. App. 17a, 30a, 34a. The first of these sentences states that "a subsidy that continues after retirement is generally to be considered a retirement-type subsidy;" the second states that a shutdown benefit "that does not continue after retirement age" will "not be considered a

retirement-type subsidy;" and the third states that regulations should "prevent the recharacterization of retirement-type benefits as benefits that are not protected." Pet. App. 17a.

Finally, despite acknowledging that the GCM's construction of section 204(g) "would lend some consistency between section 204(g) and ERISA's funding provisions," the court concluded that, in its view, there was "no compelling need for consistency in this regard." Pet. App. 36a.

Applying its construction of section 204(g) to the Westinghouse Pension Plan, the court concluded that the shutdown benefit in the Plan did continue past the normal retirement age, and therefore was protected by section 204(g). Pet. App. 37a-43a. The court reached this conclusion by comparing the actual shutdown benefit to an "early" and "actuarially reduced" benefit that would, in its view, "[n]ormally" be otherwise available. Pet. App. 40a-41a.

The court of appeals also rejected several related arguments made below by the *amicus* Association of Private Pension and Welfare Plans ("APPWP"). The court acknowledged that many plan sponsors, having "relied reasonably" on available administrative guidance from the IRS, created shutdown benefits "on the expectation that they could be modified or removed prior to an actual plant shutdown." Pet. App. 43a-44a. Nonetheless, the court concluded that this expectation "cannot override the language of the statute." Pet. App. 43a. The court further recognized that its ruling would "expose" such plan sponsors "to the threat of immediate disqualification for federal income tax purposes." Pet. App. 44a. Nonetheless, it reiterated that "section 204(g), particularly when considered with the legislative history, compels us to reach our result." *Id.* In conclusion, the court of appeals stated:

> There can be no doubt that these arguments [by APPWP] are substantial and we recognize that there may be significant adverse tax consequences as a result of this

> opinion if relief from sources other than this court is not granted. We hope that the appropriate authorities take note of this problem and take steps to alleviate it.

Id.

REASONS FOR GRANTING THE WRIT

At issue in this case is the line between protected "retirement" benefits on the one hand and unprotected "welfare" or "ancillary" benefits on the other hand. In particular, this case addresses the proper treatment of shutdown and other unpredictable contingent-event benefits under section 204(g) of ERISA. At the close of oral argument in the court of appeals, the presiding judge noted: "This is a matter of, I think I can say without fear of contradiction, great importance in this field and it is a matter of great complexity." Oral Arg. Tr. 55. As such, it deserves this Court's immediate review.

The decision below on its face demonstrates the importance of Supreme Court review. In concluding that section 204(g) protects shutdown and other unpredictable contingent-event benefits from the moment of their creation, the decision below expressly repudiated the contrary conclusions of two federal courts of appeals (Pet. App. 30a-31a), as well as the only available administrative guidance from the agency with express interpretive authority over section 204(g) (Pet. App. 26a n.12, 32a-34a). In so doing, it both subjects national pension plans to conflicting requirements in different jurisdictions and frustrates the expectation of plan sponsors who, the court of appeals acknowledged (Pet. App. 44a), had "relied reasonably" on available IRS guidance in deciding to extend shutdown benefits in the first place. Even worse, the decision below concededly exposes such plan sponsors to potentially grave ERISA and tax liabilities. *Id.* And while not acknowledged by the court of appeals, the decision below also creates potentially significant tax liability for innumerable plan participants, and

potentially significant insurance obligations for the Pension Benefit Guaranty Corporation ("PBGC").

Contrary to the court of appeals' assertion (Pet. App. 44a), nothing in the text or legislative history of section 204(g) "compels" these extraordinary consequences. In fact, the court of appeals' conclusory assertion that shutdown benefits "are clearly retirement in nature" (Pet. App. 34a) misunderstands the pertinent textual provisions of ERISA, and the court's perceived "suggest[ion]" from three isolated sentences of legislative history (Pet. App. 30a, 34a) simply misreads those very sentences, to say nothing of the overall text and legislative history of ERISA considered as a whole. Moreover, the court of appeals' analysis rests on the patently unsustainable premise that there is "no compelling need for consistency" (Pet. App. 36a) in construing a statute as complex and interwoven as ERISA. A decision that so departs from common canons of construction and other existing authorities, and that has such acknowledged serious implications and effects for pension plans around the country, plainly merits this Court's review.

I. THE DECISION BELOW DEEPENS AN EXISTING CIRCUIT SPLIT ON THE QUESTION OF HOW SECTION 204(g) APPLIES TO SHUTDOWN AND OTHER CONTINGENT-EVENT BENEFITS

As acknowledged by the district court (Pet. App. 69a) and the court of appeals (Pet. App. 13a-14a), there is a multi-circuit and administrative "split of authority" on the question of how section 204(g) applies to shutdown or other unpredictable contingent-event benefits. On the specific question of shutdown benefits, the Third Circuit's decision is consistent with decisions of the Fifth and Ninth Circuits, but directly conflicts with decisions of the Sixth and Eleventh Circuits and with GCM 39869. Moreover, on the question of unpredictable contingent-event benefits generally, the Third Circuit's decision further conflicts in principle with decisions of the Second and Seventh Circuits.

The decision below squarely conflicts with the Sixth Circuit's decision in *Ross*. That case involved a shutdown benefit continuing past age 65 and available to employees who satisfied certain age and service requirements and who lost their jobs because of a permanent plant shutdown. *See* 847 F.2d at 330. The Sixth Circuit held that such a shutdown benefit, because it "becomes due and payable only to a participant whose active service ceases by reason of a permanent shutdown," and not simply by virtue of satisfying age and service requirements, "is not one that falls within the category of . . . an early retirement benefit." *Id.* at 333. Similarly, after examining the same legislative history relied on by the court of appeals below, the Sixth Circuit concluded that shutdown benefits also are not a "retirement-type subsidy." *See id.* at 333-34. In sum, the Sixth Circuit concluded that a shutdown benefit is "not a provision mandated by ERISA, and . . . not a provision which falls within the intended scope of ERISA section 204(g)." *Id.* at 334; *see also id.* at 332 ("plant shutdown benefits are not benefits which section 204(g) was intended to protect").

The Eleventh Circuit expressly endorsed the *Ross* analysis in *Roper*. That case involved a benefit available to employees who satisfied stated age and service requirements and who were "absent from work by reason of a plant shutdown, lay-off or disability." 859 F.2d at 1473. In construing section 206(a) of ERISA, which further restricts a plan sponsor's ability to revoke an "early retirement benefit" (*see* 29 U.S.C. § 1056(a)), the Eleventh Circuit held that the benefit at issue was not an "early retirement benefit" under section 206(a) because its requirements "'encompasse[d] other factors besides age and years of service,'" namely the contingent events of a "plant shutdown, lay-off, or disability." 859 F.2d at 1473-74 (quoting district court opinion). The Eleventh Circuit made clear that the phrase "early retirement benefit" as used in sections 204(g) and 206(a) must be construed *in pari materia*, and it expressly approved and cited *Ross* for the proposition that a contingent-

event benefit is not an "early retirement benefit" under ERISA "because it contain[s] conditions other than age and service." *Id.* at 1474; *see also Blank v. Bethlehem Steel Corp.*, 758 F. Supp. 697, 700 & n.3 (M.D. Fla. 1990) (section 204(g) does not protect retirement benefits "contingent" upon "plant shutdown, layoff or disability") (citing *Ross* and *Roper*).

The Third Circuit recognized (Pet. App. 26a n.12, 32a) that its decision also squarely conflicts with GCM 39869. That document, which is deemed by case law to establish "final statements of agency policy," *see Taxation With Representation Fund v. IRS*, 646 F.2d 666, 683 (D.C. Cir. 1981), assesses how section 204(g) applies to "shutdown benefits" broadly defined as "event-based benefits that become available to individuals upon the occurrence of an event that causes an individual's employment to change." Pet. App. 96a. In pertinent part, the GCM concludes that shutdown benefits are "ancillary benefits" that become "retirement-type subsidies" protected by section 204(g) only if they continue past normal retirement age, and only upon "the occurrence of the event that triggers the right to the benefits (i.e., the contingent event)." *See* Pet. App. 101a. The GCM further explains that this conclusion "is consistent with the treatment of shutdown benefits as unpredictable contingent event benefits," which cannot be funded until occurrence of the "event on which the benefit is contingent." *Id.*

Moreover, the court of appeals correctly concluded that *Ross, Roper* and the GCM conflict not only with its decision, but also with *Harms* and *Richardson*. In *Harms*, the Fifth Circuit held that section 204(g) applies to a retirement benefit payable for life and "contingent upon an employee's involuntary separation." *See* 984 F.2d at 691. Furthermore, the court held that such a job separation benefit becomes a protected "early retirement benefit" or "retirement-type subsidy" even prior to the job separation (which in *Harms* occurred *after* the challenged plan amendment). *See id.* at 692.

Similarly, in *Richardson*, a panel of the Ninth Circuit expressly "decline[d] to follow *Ross*" (73 F.3d at 1468 n.4) and held that section 204(g) protected a shutdown benefit payable for life, and conditioned on a plant shutdown, even prior to the shutdown. *Id.* at 1469. Although the panel opinion in *Richardson* was later vacated by the Ninth Circuit (91 F.3d 1312) and rejected *en banc* on grounds not relevant here (112 F.3d 982), the court below nonetheless relied on it extensively (Pet. App. 22a-25a).

Finally, the decision below conflicts in principle with two court of appeals decisions holding that section 204(g) does not protect benefits conditioned upon a disability. *Rombach v. Nestle USA, Inc.*, 211 F.3d 190 (2d Cir. 2000), involved a monthly "disability retirement pension" available to employees who satisfied a stated service requirement and had become permanently disabled. *See id.* at 191. In an opinion by Judge Calabresi, the Second Circuit concluded that this benefit, because it was payable only "in the event of sickness, accident, disability, death, or unemployment," was a "welfare" benefit to which section 204(g) is entirely inapplicable. *Id.* at 192-93 (citations omitted). The court further concluded that, because a plan is defined as a "pension plan" only "to the extent" it "provides retirement income to employees," the fact that the benefit was provided through a "master pension plan" had no legal significance in categorizing it for ERISA purposes. *See id.* (citations omitted).

The Seventh Circuit held likewise in *Arndt v. Security Bank S.S.B. Employees' Pension Plan*, 182 F.3d 538, 544 (7th Cir. 1999). That case also involved a disability benefit payable for life, out of a pension trust, to employees who had become disabled. *See id.* at 539. The Seventh Circuit framed the question presented as "whether the benefits at issue are retirement benefits or disability benefits." *Id.* It noted that the benefit "has some characteristics of a disability payment and some characteristics of a retirement benefit or a retirement-type

subsidy." *Id.* at 543. Nonetheless, the court held that the benefit was "best characterized" as a disability benefit because it was contingent upon disability; and the court therefore held that the benefit was not protected by section 204(g). *See id.* at 544.

The decision below plainly conflicts in principle with these disability benefit cases. The Third Circuit's holding encompasses all "contingent event benefits that continue beyond normal retirement age," on the ground that "there does not appear to be any relevant distinction between plant shutdown benefits and a more broadly defined contingent event benefit." Pet. App. 31a. Accordingly, *Rombach* and *Arndt* are not distinguishable as cases involving disability benefits rather than shutdown benefits, as the Third Circuit itself made clear. Pet. App. 13a-14a n.4 ("[R]esolution of the question presented here turns not on the nature of the contingent event that triggered payment of the benefit, but on whether the benefit continues beyond normal retirement age. . . . The nature of the event that caused the employees' termination does not control this inquiry.").

The Third Circuit did attempt to distinguish *Rombach* as involving only "temporary" disability benefits. Pet. App. 31a-32a n.15. But the benefit in *Rombach*, which on its face continued past "retirement," was a monthly payment available to employees who had become "permanently" disabled. *See* 211 F.3d at 191. Similarly, the benefit in *Arndt* was "like a retirement benefit in that payment beg[an] at normal retirement age." 182 F.3d at 543. The Third Circuit's patently erroneous characterization of *Rombach*, and its failure to mention *Arndt*, confirms that these cases are not distinguishable.

In sum, the courts of appeals are now divided three-to-two on the precise question of how section 204(g) applies to benefits payable for life but conditioned on a shutdown. Moreover, the decision below expressly refused to follow GCM 39869 on that precise question. And the decision below,

which on its face applies to all unpredictable contingent-event benefits, conflicts with two other court of appeals' decisions in the analytically indistinguishable context of benefits payable for life but conditioned on a disability. This Court's review is necessary to resolve these substantial judicial and administrative conflicts.

II. THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT MERITS THIS COURT'S IMMEDIATE REVIEW

While judicial and administrative conflicts of this degree would warrant review by this Court in any event, a prompt resolution of these conflicts is particularly imperative here.

First, prompt resolution of the existing conflicts is necessary to promote ERISA's fundamental objective of ensuring "uniform national treatment of pension benefits." *Patterson v. Shumate*, 504 U.S. 753, 765 (1992). As this Court has recognized, conflicting rules can "create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare [or pension] benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). This concern has even greater force with respect to pension plans, which are regulated far more extensively than are welfare plans. Moreover, the absence of uniform rules also imposes oppressive burdens on fiduciaries administering existing plans: "An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations" and cannot "efficient[ly] . . . meet these responsibilities . . . if a benefit plan is subject to differing regulatory requirements." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

Second, the decision below will impose widespread and harsh consequences on ERISA plan sponsors and participants. Despite acknowledging that plan sponsors had "relied

reasonably" on IRS guidance in deciding to create shutdown benefits and adjust them by plan amendment (Pet. App. 44a), the court of appeals rendered a decision that could, in its own words, "expose many plans to the threat of immediate disqualification for federal income tax purposes." *Id.* Such tax disqualification would gravely injure not only the plans themselves (the income of which would be taxable), but also plan sponsors (who would lose deductions for plan contributions) and even plan participants (who would have to pay income tax on benefits years before they are received). *See* IRC §§ 404(a), 402(a), and 501(c). Moreover, plan sponsors could be subjected not only to these tax consequences, but also to potentially enormous classwide benefits liability under ERISA. Indeed, this benefits liability under ERISA could be imposed even on plan sponsors who, like petitioners here, relied on both the GCM and an IRS determination letter specifically approving the very plan amendments subsequently held to create liability. This Court should determine whether these extraordinary consequences are legally proper.

Third, the decision below deprives plan sponsors of the flexibility to adjust contingent-event benefits in response to changing economic conditions (and thus discourages the creation of such benefits in the first instance). As the court of appeals acknowledged, plan sponsors, having "relied reasonably" on available administrative guidance from the IRS, created shutdown benefits "on the expectation that they could be modified or removed"; yet, under the court of appeals' decision, such benefits "will become permanent features of those plans." Pet. App. 43a. The decision below is thus inequitable as well as counterproductive. Moreover, these effects are compounded by OBRA's restriction on funding contingent-event benefits prior to the occurrence of the contingency. 29 U.S.C. § 1082(d)(7)(B); IRC § 412(1)(7)(B). Even if a plan sponsor wished to blunt the financial impact of the decision below by immediately funding its potential liability for contingent-event benefits, it is restricted from doing so.

Congress specifically limited the reach of key ERISA provisions to ensure appropriate flexibility for plan sponsors and to facilitate the full funding of pension plans. *See, e.g., Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, and Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997). The decision below plainly impedes these statutory objectives, and this Court should promptly determine whether it does so improperly.

Finally, in addition to undermining GCMs and IRS determination letters as useful administrative tools, the decision below will impose substantial new liabilities on the PBGC, the government entity that insures private pension plans. Under federal law, the PBGC must guarantee "all nonforfeitable benefits" (29 U.S.C. § 1322(a)), which ERISA defines as pension benefits "legally enforceable against the plan" (*id.* § 1002(19)). By making contingent-event benefits "legally enforceable against the plan," even where the contingency has not yet occurred, the court of appeals' decision makes the PBGC responsible for insuring these benefits. Moreover, the magnitude of this new PBGC obligation is enhanced by plan sponsors' inability to fund contingent-event benefits in advance. Such substantial adverse impacts on two federal agencies is yet another reason why this Court's immediate review is necessary.

Recognizing many of the substantial problems created by its decision, the court of appeals expressly invited "appropriate authorities" to "take note" of its decision and "take steps" to alleviate it. Pet. App. 44a. Given the conflict in the circuits and the severe and unwarranted consequences of the court of appeals' decision, this Court is an "appropriate authority" to provide relief from the decision below.

III. THE DECISION MISCONSTRUES SECTION 204(g) OF ERISA

On the merits, the decision below is riddled with error. In holding that section 204(g) protects contingent-event benefits even prior to the occurrence of the contingency, the court of

appeals did not address the most pertinent textual provisions of ERISA, but instead rested on a conclusory and erroneous assertion that these benefits are "clearly retirement in nature" (Pet. App. 34a). Moreover, the court erroneously relied on what it described as a "suggest[ion]" (Pet. App. 30a) from three isolated sentences of a committee report. The court erred further in seeing "no compelling need for consistency" in ERISA's construction (Pet. App. 36a), and in rejecting an interpretation of the undefined terms "early retirement benefit" and "retirement-type subsidy" set forth by the administrative agency with express interpretive authority over those provisions (which concluded, contrary to the court of appeals, that "consistency" is indeed important). These interpretive errors should be corrected.

1. *Statutory text.* Despite acknowledging that ERISA does not define the terms "early retirement benefit" or "retirement-type subsidy," but leaves those terms to be defined by regulation (Pet. App. 14a), the court of appeals asserted that shutdown and other contingent-event benefits, if provided after the normal retirement age, are "clearly retirement in nature" (Pet. App. 34a). That conclusory assertion ignores the controlling text of ERISA (as amended by REA and OBRA), which makes clear that contingent-event benefits are not "retirement in nature," and are unprotected prior to the occurrence of the contingency.

To begin with, as Judge Calabresi explained in *Rombach* (211 F.3d at 192-93), benefits conditioned on disability are plainly "welfare" benefits under ERISA because they are "benefits in the event of . . . disability" (29 U.S.C. § 1002(1)). Similarly, benefits conditioned on a job separation or shutdown are also "welfare" benefits because they are "benefits in the event of . . . unemployment" (*id.*). For that reason, section 204(g), like all other accrual and vesting provisions of ERISA, is wholly inapplicable to such shutdown benefits. *Id.* § 1051(1). Moreover, as Judge Calabresi further explained

(211 F.3d at 192-93), the fact that a benefit is paid out of a "pension" trust in no way changes this analysis, because ERISA makes clear that a single plan may provide both "pension" and "welfare" benefits (29 U.S.C. § 1002(3)), and is a "pension" plan only "to the extent" it provides "retirement income" as opposed to "welfare" benefits (*id.* § 1002(2)(A)).

Moreover, while REA amended section 204(g) to protect an "early retirement benefit" or "retirement-type subsidy," it otherwise left "ancillary benefits" outside of the scope of section 204(g); and shutdown and other unpredictable contingent-event benefits are highly analogous to "ancillary" benefits that are undisputedly unprotected by section 204(g). For example, in exercising its interpretive authority over that provision, the IRS has stated that section 204(g) does *not* protect, among other things, health insurance, accident insurance, and life insurance provided through a pension trust. 26 C.F.R. § 1.411(d)-4. As insurance against unwanted and unpredictable events, shutdown benefits (like disability benefits) are far more akin to these "ancillary" benefits than they are to traditional "retirement income" benefits that employees "anticipat[e]" and work towards over time (29 U.S.C. § 1001(A)), and thus can reasonably expect to receive.

The text of section 204(g) reinforces this analysis. On its face, that provision states that an "early retirement benefit or a retirement-type subsidy . . . shall be treated as reducing accrued benefits." 29 U.S.C. § 1054(g). As the court of appeals itself acknowledged, such "accrued" benefits increase steadily and predictably over time "by reference to an employee's age, years of service, and years of participation." Pet. App. 34a. In contrast, an unpredictable contingent-event benefit is not earned ratably and predictably over time by reference to such criteria, but rather is earned (if at all) only upon the occurrence of the unexpected and unwanted contingency. To be sure, as the court of appeals noted (Pet. App. 34a-35a), the value of a contingent-event benefit may be measured by, and thus in a

sense increase over time, by reference to age, years of service, and years of participation. Nonetheless, until the unpredictable contingent event occurs, an employee by definition has not earned *any* of the benefit, and cannot reasonably anticipate receiving the benefit until the unpredictable contingent event actually occurs. Moreover, because section 204(g) protects only "benefits attributable to service before the amendment," 29 U.S.C. § 1054(g), section 204(g) cannot reasonably be said to apply to a contingent-event benefit, as a contingent-event benefit is more proximately attributable to the contingency itself than it is to service before any plan amendment. *See, e.g., Arndt*, 182 F.3d at 543 ("The disability is the reason for the benefit.").

Finally, this analysis is confirmed even more by the funding provisions inserted by OBRA into ERISA. Those provisions define a legally distinct category of "unpredictable contingent event benefits," which do *not* include any form of "retirement income" benefit, and which *do* make the occurrence of the contingency a legally significant event. 29 U.S.C. § 1082(d)(7)(B)(i); IRC § 412 (l)(7)(B)(i). Because statutory construction involves "reconciling many laws enacted over time, and getting them to 'make sense' in combination," *United States v. Fausto*, 484 U.S. 439, 453 (1988), and because courts must "interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted," *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1870 n.17 (2000), the terms "early retirement benefit" and "retirement-type subsidy" in section 204(g) should be construed as not extending to the "unpredictable contingent event benefits" separately addressed in OBRA. Read as a whole, ERISA makes it plain that contingency does matter, and that "contingent event" benefits and "retirement income" benefits are legally distinct concepts. Accordingly, the failure of section 204(g) to mention contingency does not suggest that contingent-event benefits are protected prior to the occurrence of the contingent event, as

the court of appeals erroneously concluded (Pet. App. 32a-33a), but rather confirms that they are unprotected.

2. *Statutory context and legislative history.* The court of appeals further erred in its extensive reliance (Pet. App. 31a-32a, 34a,) on what it described as a "suggest[ion]" and "overarching concept" gleaned from three isolated sentences of a Senate Finance Committee report. That analysis ignores this Court's admonition that "it is the statute, and not the Committee Report, which is the authoritative expression of the law." *City of Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 337 (1994). As explained above, ERISA strongly suggests that section 204(g) does not encompass unearned contingent-event benefits, and, to the extent that there is uncertainty on this point, it assigns interpretive authority not to the Senate Finance Committee, but to the IRS.

Moreover, the court of appeals simply misread the legislative history of REA. As explained above, the legislative history makes clear that section 204(g) does protect a retirement benefit "for employees who have completed 30 years of service," S. Rep. No. 98-575, at 28, 1984 U.S.C.C.A.N. at 2574, and does not protect various "ancillary" and contingent-event benefits such as medical benefits, death benefits, and disability benefits, *id.* at 30, 1984 U.S.C.C.A.N. at 2576. As explained above, shutdown benefits also constitute such unprotected ancillary and contingent benefits.

To overcome the statutory text and the overall thrust of the legislative history, the court of appeals finely parsed three individual sentences in the Senate Committee Report. Pet. App. 17a, 31-32a, 34a. This exercise was fundamentally misguided, for if it is "undesirable . . . to dissect the sentences of the United States Reports as though they were the United States Code," *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993), it is surely even less desirable to so dissect committee reports. *See, e.g., Burns v. Stone Forest Indus., Inc.*, 147 F.3d 1182, 1184 (9th Cir.) ("It makes no sense to

parse the ambiguous legislative history as though it were the law."), *cert. denied*, 525 U.S. 1040 (1998).

In any event, the three individual sentences parsed by the court of appeals are at best equivocal, and provide no significant support for its holding. The first parsed sentence states that "a subsidy that continues after retirement is generally to be considered a retirement-type subsidy." Pet. App. 17a. On its face, that sentence expressly contemplates exceptions to the asserted general rule, and says nothing about their scope or character. The second parsed sentence states in part that "a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy." *Id.* It does *not* state that a shutdown benefit that *does* continue past retirement age *will* be considered a retirement-type subsidy. Moreover, the very same sentence states explicitly that numerous other ancillary and contingent benefits — including medical, death and disability benefits — will *not* be considered a retirement-type subsidy *even if* they continue past retirement age. Shutdown benefits should not be treated any differently; as the court of appeals itself acknowledged, "there does not appear to be any relevant distinction between plant shutdown benefits and a more broadly defined contingent event benefit." Pet. App. 31a. Finally, the third parsed sentence anticipated regulations that would "prevent the recharacterization of retirement-type benefits as benefits that are not protected." Pet. App. 17a. That statement simply begs the question of what constitutes "retirement-type benefits" in the first place. Moreover, it confirms that this question was to be resolved not by the various lower courts, but by an expert administrative agency with the ability, and the express interpretive authority, to provide uniform guidance.

Finally, the court of appeals' analysis is in tension with the specific historical background against which REA was enacted. As the court of appeals acknowledged (Pet. App. 10a-11a), REA was prompted by court decisions holding that section

204(g) did not protect "early retirement" benefits that were keyed solely to age and service, but that commenced prior to the normal retirement age. *See, e.g., Bencivenga*, 763 F.2d at 577. Nothing in REA's text or legislative history suggests that Congress, in extending the protection of section 204(g) to such reasonably anticipated "early retirement" benefits, also intended to protect a wide range of welfare, ancillary, and contingent-event benefits that had never been subject to ERISA's accrual and vesting requirements and that cannot be so reasonably anticipated. Moreover, despite the court of appeals' further erroneous conclusion (Pet. App. 40a-41a), nothing in REA requires courts to assess shutdown benefits by reference to "early" and "actuarially reduced" benefits.

3. *Structure and consistency*. The court of appeals compounded its error with the remarkable assertion (Pet. App. 36a) that there is "no compelling need for consistency" between section 204(g) of ERISA on the one hand and the funding provisions of ERISA on the other. To the contrary, it is a bedrock ERISA principle that protected benefits should be funded, *see, e.g.*, 29 U.S.C. § 1001(c); *Nachman Corp. v. PBGC*, 446 U.S. 359, 375 (1980), and the decision below gravely undermines that principle.

Under the court of appeals' construction of section 204(g), unpredictable contingent-event benefits cannot be reduced or eliminated by plan amendment, even prior to the occurrence of the contingency. Pet. App. 29a-31a. But, under ERISA's funding provisions, those same benefits cannot be funded before the contingency occurs. *See, e.g.*, 29 U.S.C. § 1082(d)(7)(B)(i); IRC § 412(l)(7)(B)(i). Thus, the decision below gives rise to the anomaly of a significant category of benefits that plan sponsors must provide but cannot fund.

Although funding rules may not necessarily dictate all liability rules, the general interpretive principle that statutory provisions should be construed to "'make sense' in combination" (*Fausto*, 484 U.S. at 453), as well as ERISA's

core concern that protected benefits be fully funded, strongly suggests that consistency in this regard should be preferred over inconsistency. The GCM correctly concluded that consistency is important in this context (Pet. App. 101a), and the court of appeals erred in concluding to the contrary.

4. *Administrative guidance*. These various textual, historical, and structural considerations clearly demonstrate that the court of appeals misconstrued section 204(g). But any doubt about the proper scope of that provision should have been resolved in favor of the administrative guidance provided in the GCM, and the Third Circuit's refusal to do so was additional error.

Section 204(g) establishes the need for administrative guidance on its face. That provision does not define the terms "early retirement benefit" or "retirement-type subsidy"; thus, the court of appeals plainly erred in asserting (Pet. App. 32a) that the IRS's interpretation is "in conflict with the express terms" of section 204(g). Even more obviously, section 204(g) provides that these terms are to be "defined in regulations" promulgated by the Secretary of the Treasury (29 U.S.C. § 1054(g)), who has delegated that authority to the IRS (*see* Treas. Reg. § 301.7805-1(a)). Accordingly, in construing section 204(g), the court of appeals was not free to substitute its judgment for the reasonable judgment of the IRS.

Even absent an express grant of interpretive authority, this Court repeatedly has stressed the importance of administrative guidance with regard to complex ERISA and tax issues. In *Mead Corp. v. Tilley*, 490 U.S. 714 (1989), this Court warned that "[f]or a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" *Id.* at 726 (citation omitted). In *PBGC v. LTV Corp.*, 496 U.S. 633, 648-52 (1990), this Court similarly stressed that interpretations of ERISA "are precisely the kind that agencies are better equipped to make than courts," given the importance

of "practical agency expertise" in this context. Finally, the Court also has applied these principles to IRS interpretations of the tax code: "In an area as complex as the tax system, the agency Congress vests with administrative responsibility must be able to exercise its authority to meet changing conditions and new problems . . . . [T]his Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code." *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983). The court of appeals gave no proper justification for disregarding these settled principles.

In particular, the court of appeals erred in concluding (Pet. App. 26a n.12) that *Christensen v. Harris County*, 120 S. Ct. 1655, 1663 (2000), authorized it to disregard the GCM. *Christensen* held only that certain informally expressed administrative interpretations of the Fair Labor Standards Act should be reviewed under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), rather than under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Under *Skidmore*, courts must give "considerable and in some cases decisive weight" to administrative interpretations reflecting "specialized experience" and "thoroug[h]" and "consisten[t]" analysis. 323 U.S. at 139-40. *Skidmore* also recognizes that regulated parties "may properly resort" to administrative interpretations for "guidance," a reliance interest that counsels for rejection of such administrative interpretations, "only where justified by very good reasons." *Id.* at 140. Soon after deciding *Christensen* last Term, this Court reinforced those longstanding principles in holding that, where an agency has been delegated administrative authority over a "technical" subject matter, and where "the relevant history and background are complex and extensive," an agency's views, even if informally expressed, "should make a difference." *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1926 (2000).

GCM 39869 easily satisfies the requirements for "considerable" or "decisive" weight under *Skidmore* and its

progeny. The IRS has been delegated not only administrative authority in general, but express interpretive authority over section 204(g) in particular. Moreover, the IRS obviously has "specialized experience" in interpreting and administering ERISA and its tax counterparts. The subject matter here is unquestionably "technical" and "complex." Furthermore, the GCM's analysis is thorough, validly synthesizes a number of provisions of ERISA, and represents the only available administrative guidance on how section 204(g) applies to unpredictable contingent-event benefits. Finally, and most importantly, plan sponsors "properly resort[ed]" to the GCM for "guidance," as confirmed by the court of appeals' own acknowledgment that they "relied reasonably" on this guidance. Pet. App. 44a. Under these circumstances, the court of appeals erred in disregarding the GCM's guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 13, 2000

APPENDIX

221 F.3d 517

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3775

HARRY BELLAS,

Appellee,

vs.

CBS, INC.; WESTINGHOUSE PENSION PLAN,

Appellants.

Argued June 15, 2000
Filed Aug. 14, 2000

BEFORE: GREENBERG and McKEE, Circuit Judges, and SHADUR, District Judge*

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter has been certified for interlocutory appeal to address a question of first impression in this court, i.e., whether a permanent job separation benefit contained within a pension

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* Honorable Milton I. Shadur, Senior Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

plan constitutes an early retirement benefit or retirement-type subsidy protected by the anti-cutback provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, as amended by the Retirement Equity Act of 1984 ("REA") and the Omnibus Reconciliation Act of 1987. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and ERISA section 502(e), 29 U.S.C. § 1132(e).

On June 29, 1999, the district court granted plaintiff-appellee Harry Bellas's motion for partial summary judgment, *see Bellas v. CBS, Inc.*, 73 F. Supp. 2d 500 (W.D.Pa. 1999), and denied defendants-appellants CBS, Inc.'s and Westinghouse Pension Plan's motion to dismiss the complaint. *See Bellas v. CBS, Inc.*, 73 F. Supp. 2d 493 (W.D.Pa. 1999). On July 13, 1999, appellants filed a motion to certify the order granting Bellas's motion for partial summary judgment for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) which the district court granted on July 29, 1999. Subsequently, the appellants filed a petition for permission to appeal under section 1292(b), which we granted on September 10, 1999.

a. Parties and Factual Background

Bellas, a former employee of CBS and Westinghouse Electric Corporation, on August 31, 1998, filed this action on behalf of himself and all others similarly situated against CBS and the Westinghouse Pension Plan, alleging that the Westinghouse Plan was amended impermissibly by first the narrowing, and then the elimination entirely, of a "Special Retirement Provision" in the plan that was applicable to senior employees terminated as a result of a "Permanent Job Separation." *See* J.A. at 269. Because CBS is the plan sponsor and administrator and is a successor to Westinghouse, CBS and Westinghouse may be considered one entity for purposes of this appeal and thus we will refer to the corporate defendant as CBS even though Westinghouse previously

employed Bellas. Bellas contends that these amendments had the effect of eliminating or reducing an early retirement benefit or retirement-type subsidy in contravention of the REA amendments to ERISA codified at section 204(g), 29 U.S.C. § 1054(g). Bellas further claims that in adopting and implementing these amendments, CBS violated its fiduciary duties of acting solely in the interest of plan participants and beneficiaries in administering the plan in accordance with both the governing documents and instruments and ERISA, and of exercising care, prudence, and diligence in the performance of its responsibilities and thereby violated ERISA.

Section 20 of the pre-1994 version of the Westinghouse Plan provided a "Special Retirement Provision" for employees meeting stated age and service requirements who were terminated as a result of a "Permanent Job Separation" (the "PJS Benefit"). In particular, Section 20 of the pre-1994 version of the plan provided in relevant part:

> B. 1. An Employee whose employment is terminated as a result of a Permanent Job Separation, who at the time of such Permanent Job Separation does not satisfy any of the requirements for retirement pursuant to Section 2 of the Plan, may retire on his Special Retirement Date or on the first day of any month following his Special Retirement Date if, by the end of the calendar year in which he is separated, he would have satisfied one of the age-and-service combinations set forth below had he remained continuously employed to the end of such year:
>
> — Age 50 or over with twenty-five (25) or more years of Eligibility Service,
>
> — Age 51 or over with twenty-two (22) or more years of Eligibility Service,
>
> — Age 52 or over with nineteen (19) or more years of Eligibility Service,

— Age 53 or over with sixteen (16) or more year s of Eligibility Service,

— Age 54 or over with thirteen (13) or more years of Eligibility Service,

— Age 55 or over with ten (10) or more years of Eligibility Service.

2. The amount of monthly pension payable to an Employee who satisfies the requirements set forth in Subsection 20.B.1 above shall be the sum of (a), (b) and (c) below:

(a) Any amounts computed pursuant to Section 4 of the Plan [Section 4 is entitled "Normal Retirement Pension"].

(b) Ten ($10.00) dollars multiplied by his Credited Service.

(c) If the Employee had twenty-five (25) years of eligibility Service and his Special Retirement Date is on or before September 1, 1994, an additional $100.

The amounts calculated in accordance with Subsection 20.B.2 above shall be based on the provisions of the Plan in effect on the Employee's Special Retirement Date.

3. The amount calculated in accordance with Subsection 20.B.2 (a) shall be payable for the lifetime of the Employee and shall be subject to all of the optional forms of payments described in Section 10.

4. The amounts calculated in accordance with Subsections 20.B.2 (b) and 20.B.2 (c) shall be payable up to and including the month in which the Employee attains his 62nd birthday. These amounts shall not be subject to any of the optional forms of payment described in Section 10, except the Lump Sum form described in Subsection 10.C.5.

J.A. at 74-75.

The pre-1994 version of the Westinghouse Plan, in pertinent part, defined the term "Permanent Job Separation" as meaning "the termination of the employment of an Employee . . . through no fault of his own through lack of work for reasons associated with the business for whom [the employer] determines there is no reasonable expectation of recall." *Id.* at Section 1, J.A. at 38. Further, the Pre-1994 Summary Plan Description explains with respect to this provision:

> [t]he amount of your special retirement pension is the full amount you have earned to the date you are permanently separated. There are no reductions applied to your pension, even though you are retiring early. If you are under age 62, you receive a monthly early retirement supplement of $10 for each year of credited service. This supplement stops when you turn age 62. If you have at least 25 years of eligibility service, you receive an additional $100 per month until you turn age 62. This additional $100 per month is available only if your special retirement pension begins on or before September 1, 1994.

J.A. at 110.

The pre-1994 version of the Plan also contained a "Normal Retirement Pension" provision and an "Early Retirement Pension" provision. *See* pre-1994 version of the Westinghouse Plan, Sections 4-5, J.A. at 42-48.

On January 1, 1994, the Westinghouse Plan was amended to alter participants' entitlement to the PJS Benefit in two respects: (1) the amendments made it harder to qualify for the PJS Benefit after January 1, 1997, by narrowing the definition of "Permanent Job Separation" to apply only if an employee's employment termination was due to a job movement, product line relocation, or location close-down and (2) the amendments eliminated the PJS Benefit in toto for terminations on or after

September 1, 1998.[1] More specifically, the definition of the term "Permanent Job Separation" was redefined in the 1994 version of the plan, in relevant part, to read as follows:

> Permanent Job Separation means, for periods prior to January 1, 1997, the termination of the employment of an Employee with an Employer . . . through no fault of his own for lack of work for reasons associated with the business for whom such Employer . . . determines, on a uniform nondiscriminatory basis, that there is no reasonable expectation of recall.
>
> . . . .
>
> For periods on or after January 1, 1997 and before September 1, 1998, a Permanent Job Separation means solely the termination of the employment of an Employee with an Employer . . . because of job movement or product-line relocation, or location closedown, as those terms are defined below. . . . Layoffs due to adjustments in the workforce caused by changes in production requirements, manufacturing processes, sales volume, inventory levels, make or buy decisions, decisions to discontinue a product line, or any other reasons associated

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[1] With respect to the total elimination of the Special Retirement Pension after September 1, 1998, appellants, without providing any supporting documentation, explained in their opposition to *Bellas's* motion for summary judgment that "[t]he Plan was amended in 1998 to extend the 1994 PJS [Permanent Job Separation] benefit because of job movement or product-line relocation, or location closedown until the year 2000." *See Bellas*, 73 F. Supp. 2d at 502-03 n.2 (citing Defendants' Opposition to Plaintiff's Motion for Summary Judgment, p. 6 n.7). For purposes of its decision, the district court concluded it was immaterial whether or not the amendments totally eliminated the Special Retirement Pension after September 1, 1998, because appellants did not dispute that by amending the Westinghouse Plan to narrow the definition of "Permanent Job Separation," a participant's ability to receive a PJS Benefit under the Westinghouse Plan was reduced.

> with the business shall not be a job movement or product-line relocation. . . . In no event shall a Permanent Job Separation occur after August 31, 1998.

1994 Version of the Westinghouse Plan, J.A. at 131-32.

CBS employed Bellas in its nuclear division from 1964 until December 31, 1997, during which employment he was a participant in the Westinghouse Plan at all relevant times before December 31, 1997, including the time of the adoption of the 1994 amendments. Bellas was notified of the amendments either in late 1994 or upon the distribution of the January 1, 1995 Summary Plan Description of the Westinghouse Plan.

CBS terminated Bellas's employment on December 31, 1997, through no fault of his own, for lack of work for reasons associated with CBS's business and with no reasonable expectation of recall. At the time of his termination, Bellas was over 50 years of age and had 30 years of service with CBS. Under the pre-1994 version of the Westinghouse Plan, upon his termination Bellas would have satisfied all of the conditions necessary to receive the PJS Benefit (i.e. age, years of service, and reason for termination).

b. Procedural History

Bellas filed this class action on August 31, 1998, against CBS and the Westinghouse Pension Plan. Count one of the complaint alleged that the 1994 amendments to the Westinghouse Plan, which amended eligibility conditions for receipt of PJS Benefits, violated section 204(g) of ERISA. *See* J.A. at 275. Count two of the complaint alleged that, in adopting and implementing those amendments, CBS violated fiduciary duties imposed under ERISA. *See id.* at 275-76. While appellants deny that they violated ERISA, they do not dispute that the amendments greatly reduced Bellas's benefits.

Appellants moved to dismiss the complaint, and Bellas moved for partial summary judgment on the question of

whether the 1994 plan amendments violated section 204(g). As we have indicated, on June 29, 1999, the district court denied appellants' motion to dismiss, *see Bellas v. CBS, Inc.*, 73 F. Supp. 2d 493, and granted Bellas's motion for partial summary judgment. *See Bellas v. CBS, Inc.*, 73 F. Supp. 2d 500.

In reaching its decision that the plan amendments violated ERISA section 204(g), the district court adopted reasoning directly contrary to the Internal Revenue Service's interpretation of IRC § 411(d)(6), the IRC's counterpart to section 204(g), as set forth in its General Counsel's Memorandum ("GCM") 39869 dated April 6, 1992, a memorandum that we consider later as a central matter on this appeal. Recognizing the direct conflict between its ruling and the IRS interpretation, the district court granted appellants' motion to certify the partial summary judgment order for an interlocutory appeal. *See* J.A. at 316-17. As we have indicated, we granted appellants' subsequent petition for permission to appeal. *See id.* at 1.

The district court set forth the controlling question of law in its order granting appellants' motion to certify the partial summary judgment order for interlocutory appeal, as:

> Whether the Permanent Job Separation benefit contained in the pre-1994 version of the Westinghouse Pension Plan is a retirement-type subsidy protected by section 204(g) of ERISA, 29 U.S.C. § 1054(g).

J.A. at 316.

II. DISCUSSION

We exercise plenary review with respect to the district court's order on the motion for partial summary judgment. *See Seibert v. Nusbaum, Stein, Goldstein, Bronstein & Compeau*, 167 F.3d 166, 170 (3d Cir. 1999); *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224,

1230 (3d Cir. 1993). We will affirm only if we conclude that the pleadings, depositions, answer to interrogatories and admissions on file, together with the affidavits, show that the party who obtained summary judgment on a point was entitled to that judgment as a matter of law and that there was no genuine dispute of material fact standing in his or her way. *See* Fed. R. Civ. P. 56(c). Here, however, it is clear that we are not concerned with disputed questions of fact and thus our determination is essentially legal in nature.

We start our discussion of the issues by recognizing that ERISA neither mandates the creation of pension plans nor in general dictates the benefits a plan must afford once created. *See Smith v. Contini*, 205 F.3d 597, 602 (3d Cir. 2000); *Dade v. North Am. Philips Corp.*, 68 F.3d 1558, 1561 (3d Cir. 1995) (citing *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988); H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4639, 4670, 4677). Only the plan itself can create an entitlement to benefits. Consequently, "[this court is] required to enforce the Plan as written unless [it] can find a provision of ERISA that contains a contrary directive." *Dade*, 68 F.3d at 1562.

The protection of retirement benefits reflects the underlying policy goals of ERISA. Congress's chief purpose in enacting the statute was to ensure that workers receive promised pension benefits upon retirement. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980); *see also Smith*, 205 F.3d at 604. In constructing ERISA, Congress perceived the statute's accrual and vesting provisions as the heart of that protection. *See Hoover v. Cumberland, Maryland Area Teamsters Pension Fund*, 756 F.2d 977, 985 (3d Cir. 1985). Accordingly, it recognized that:

> 'Unless an employee's rights to his accrued pension benefits are nonforfeitable, he has no assurance that he will ultimately receive a pension. Thus, pension rights which have slowly been stockpiled over many years may suddenly be lost if the

> employee leaves or loses his job prior to retirement. Quite apart from the resulting hardships, . . . such losses of pension rights are inequitable, since the pension contributions previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefit which he would have received.'

Smith, 205 F.3d at 604 (quoting S.Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4890, 4930). Therefore, in *Hoover*, we concluded that a plan amendment that retroactively reduced benefits promised to plaintiffs for almost seven years was precisely the sort of inequity Congress designed ERISA to prevent. *See* 756 F.2d at 985-86.

As we have indicated, this appeal presents the question of whether the PJS Benefits provided for in the Westinghouse Plan constitute accrued benefits protected by the anti-cutback provisions of ERISA section 204(g). Section 204(g) prohibits an employer from decreasing or eliminating a participant's accrued benefits by plan amendment. *See* 29 U.S.C. § 1054(g). Before 1984, ERISA did not protect early retirement benefits or retirement-type subsidies because they were not considered to be accrued benefits. *See Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574, 577 (3d Cir. 1985).[2]

While the definition of an accrued benefit has not been modified, Congress did modify section 204(g) in 1984 to the end

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[2] ERISA defines an accrued benefit as "in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). ERISA defined normal retirement age as the earlier of the normal retirement age under the plan or the age of 65. *See id.* § 1002(24). Because an early retirement provided a benefit commencing before normal retirement age, such a benefit was found not to fall within the definition of an "accrued benefit." *See Bencivenga*, 763 F.2d at 577.

that early retirement benefits and retirement-type subsidies were defined as being accrued for purposes of ERISA's anti-cutback provisions. *See* Retirement Equity Act ("REA"), Pub. L. No. 98-397. Thus, ERISA section 204(g), as amended, provides:

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any—

(A) tax credit employee stock ownership plan (as defined in section 409(a) of Title 26), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of Title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

29 U.S.C. § 1054(g).[3]

After 1984, a plan sponsor could eliminate prospectively an early retirement benefit by amendment, but under section 204(g) the amendment could not adversely affect that portion of an early retirement benefit that already had accrued to a plan

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[3] IRC § 411(d)(6) which parallels section 204(g) is relevant to our discussion. Section 411(d)(6) provides:

Accrued benefit not to be decreased by amendment.—

(A) In general.—A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

(B) Treatment of certain plan amendments.—For purposes of subparagraph (A), a plan amendment which has the effect of—

(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(ii) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary may by regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).

IRC § 411(d)(6). "Regulations prescribed by the Secretary of the Treasury under section[ ]. . . 411 . . . of Title 26. . . shall also apply to the minimum participation, vesting, and funding standards set forth in [ERISA]." 29 U.S.C. § 1202(c). Accordingly, the interpretation of section 411(d)(6) is relevant to the instant appeal; section 204(g) and section 411(d)(6) are meant to be interpreted consistently. *See id.*

participant who satisfied the pre-amendment conditions for the benefit either before or after the amendment. *See* 29 U.S.C. § 1054(g); *Dade*, 68 F.3d at 1562. Thus, if the 1994 Westinghouse Plan amendments reduced or eliminated early retirement benefits or retirement-type subsidies, the amendments would have had to allow employees who remained employed by CBS after the amendments to "grow into" the benefit. *See id.* at 1562.

Of course, we are required to enforce the Westinghouse Plan as written unless we can find a provision of ERISA that contains a contrary directive. *See Dade*, 68 F.3d at 1562. The question then is whether section 204(g) is such a directive and this in turn depends on the contingent nature of the PJS Benefits.

There is no question but that a standard early retirement benefit, provided exclusively upon the satisfaction of certain age and/or service requirements, is an accrued benefit that is protected by section 204(g). *See, e.g., Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1143-44 (3d Cir. 1993); *see also Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1034 (7th Cir. 1996); *Richardson v. Pension Plan of Bethlehem Steel*, 67 F.3d 1462, 1467-68 (9th Cir. 1995); *Costantino v. TRW Inc.*, 13 F.3d 969, 977 (6th Cir. 1994); *Hunger v. AB*, 12 F.3d 118, 120 (8th Cir. 1993); *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686, 692 (5th Cir. 1993); *Aldridge v. Lily-Tulip, Inc., Salary Retirement Plan Benefits Comm.*, 953 F.2d 587, 590 (11th Cir. 1992). Despite the agreement that surrounds this general principle, the extension of section 204(g)'s coverage to benefits whose payment is contingent upon the occurrence of an unpredictable event,[4] as are the PJS Benefits at issue on this

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[4] In this case, the Pre-1994 Westinghouse Plan provided benefits contingent upon certain involuntary job losses. The courts, and the appellants and the amicus, refer to this form of benefit as a plant shutdown benefit even though the actual benefit provided may be triggered by events other than a plant shutdown. Because there is no relevant

appeal as their availability was triggered by employment termination, has led to a split of authority.

a. Defining the Terms Early Retirement Benefit and Retirement-Type Subsidy

ERISA does not specifically set forth the definition of early retirement benefit or retirement-type subsidy. Rather, Congress contemplated that the Treasury Department would promulgate regulations setting forth the definition of retirement-type subsidy. *See* 29 U.S.C. § 1054(g)(2)(A). To date, the Treasury has not promulgated or proposed any such regulations.[5] Nevertheless, on a general level, the definitions of early

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distinction between terming the benefit a plant shutdown benefit or a job loss benefit, we adopt the use of the term "plant shutdown" to facilitate discussion, though we recognize that Bellas himself was not terminated as a result of a plant shutdown, as that term may be commonly understood. Notwithstanding the concerns raised in the concurring opinion, we find that the resolution of the questions presented here turns not upon the nature of the contingent event that triggered payment of the benefit, but on whether the benefit continues beyond normal retirement age and therefore qualifies as an early retirement benefit or retirement-type subsidy. The nature of the event that caused the employee's termination does not control this inquiry

[5] While regulations have not been promulgated that define what is an accrued benefit protected by the anti-cutback provision, the Treasury Department has issued a regulation in which it sets forth certain benefits that are not accrued benefits for purposes of IRC § 411(d)(6). The list of benefits that are not accrued benefits includes: (1) ancillary life insurance protection, (2) accident or health insurance, (3) certain social security supplements, (4) the availability of loans, (5) the right to take after-tax employee contributions or elective deferrals, (6) the right to direct investments, (7) the right to a particular form of investment, (8) the allocation of dates for contributions, forfeitures, and earnings, the time for making contributions, and the valuation dates for account balances, (9) administrative procedures for distributing benefits, and (10) rights that derive from administrative and operational provisions. *See* 26 C.F.R. § 1.411(d)-4 (in particular subsection (d) to Answer 1).

retirement and retirement-type subsidy appear to be the subject of some agreement.

ERISA provides that normal retirement age usually is 65. *See* 29 U.S.C. § 1002(24). The Westinghouse Plan also considers the age of 65 to be the normal retirement age. *See* Westinghouse Plan § 2.A, J.A. at 40. "[A]llowance . . . for retirement at an earlier age legally creates an 'early' retirement benefit. The fact that the plan does not expressly use the word 'early' is not consequential." *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 281 (3d Cir. 1988).

We have defined a retirement-type subsidy to be the excess in value of a benefit over the actuarial equivalent of the normal retirement benefit. *See Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1521 n.6 (3d Cir. 1988); *see also Dade*, 68 F.3d at 1562 n.1. We explain this concept immediately below.

Pension plans frequently provide for early retirement benefits. *See* Dan M. McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* (6th ed. 1989) at 131-35, App. 2 to *Amicus* Br. Such early retirements often commence at age 55 and possibly require the fulfilment of a minimum period of service. *See id.* The value of the early retirement benefit is calculated by first determining the amount that would be payable to the participant at normal retirement age, given the participant's service and compensation as of the date of early retirement. *See id.* This value then is reduced by a factor reflecting that benefit payments will begin earlier than was contemplated and, therefore, are likely to continue for a longer period of time. *See id.* This reduction of the normal retirement benefit in the case of an early retirement often is termed an actuarial reduction. *See id.* The provision of an early retirement benefit greater than the actuarial equivalent of the normal retirement benefit is referred to as a subsidized early retirement. *See id.*; *see also Ashenbaugh*, 854 F.2d at 1521 n.6; *Dade*, 68 F.3d at 1562 n.1.

b. The Legislative History of Current Section 204(g)

The legislative history of the REA provides some insight into the definition of the term "retirement-type subsidy" and the reach of section 204(g). In the Senate Report addressing the REA, the purpose for the amendment was set forth as follows:

> Reasons for Change
>
> The committee believes that the protection of accrued benefits, which are essentially retirement benefits, against reduction by plan amendments is an essential safeguard for plan participants and their beneficiaries. The committee also believes that valuable rights of the participants should not be lost through the elimination of benefit options because options of equal actuarial value may not be of equal value to people whose particular circumstances are not taken into account in determining actuarial equivalence.

S. Rep. No. 98-575, 98th Cong., 2d Sess., at 27 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2573.

The scope of section 204(g) was described in the following manner:

> Accordingly, the bill makes it clear that the prohibition against reduction of a benefit subsidy (the excess of the value of a benefit over the actuarial equivalent of the normal retirement benefit) applies to a participant only if the participant meets the conditions imposed by the plan on the availability of the subsidy. If the protection is afforded, an employee's accrued benefit is not to be less than the protected level or the accrued benefit determined under the plan without regard to the protection, whichever is greater. For example, if a plan is amended to eliminate a subsidized early retirement benefit for employees who have completed 30 years of service, then the plan would not be required to provide the subsidy to an employee who never completes 30 years of service and it would not be required to provide benefits to

> such an employee before the normal retirement age. On the other hand, if the employee completes 30 years of service, then the employee's accrued benefit is not to be less than the protected level or the accrued benefit determined without regard to the protection, whichever is greater.

Id. at 28, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574.

With respect to retirement-type subsidies, the Senate Report stated:

> The bill provides that the term 'retirement-type subsidy' is to be defined by Treasury regulations. The committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy. *The committee expects that Treasury regulations will prevent the recharacterization of retirement-type benefits as benefits that are not protected by the provision.*

Id. at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576 (emphasis added). Accordingly, Congress clearly expressed its intent that the term "retirement- type subsidy" not be defined in such a way as to exclude a benefit that is essentially a retirement-type benefit from the protections of section 204(g).

c. Cases Finding Job Separation Benefits Are Not Accrued Benefits

We are aware of three published opinions which arguably support appellants' position that the PJS Benefits provided under the Westinghouse Plan are not subject to the anti-cutback provisions of section 204(g): *Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329 (6th Cir. 1988); *Roper v. Pullman Standard*, 859 F.2d 1472 (11th Cir.

1988) (per curiam); and *Blank v. Bethlehem Steel Corp.*, 758 F. Supp. 697 (M.D.Fl. 1990).[6]

In *Ross*, the Court of Appeals for the Sixth Circuit considered a plan that provided employees meeting certain age and service requirements with the immediate payment of pension benefits in the event of a plant shutdown. *See Ross*, 847 F.2d at 330. The *Ross* court was concerned with the determination of whether the plant shutdown benefits were an early retirement benefit, retirement-type subsidy or optional form of benefit for purposes of section 204(g). *See id.* at 333.

The court explained that:

> Early retirement benefits are generally benefits that become available upon retirement at or after a specified age which is below the normal retirement age, and/or upon completion of a specified period of service. An optional form of benefit is generally one that involves the power or right of an employee to choose the way in which payments due to him under a plan will be made or applied. The . . . plant shutdown benefit becomes due and payable only to a participant whose active service ceases by reason of a permanent shutdown of the plant, and who at the date of such cessation of service has at least 15 years of Benefit Service and either (a) is at least 55 years old or (b) has a combined age and years of Benefit Service equal to 80 or more.

Id. The court concluded that a plant shutdown benefit is not one that falls within the category of either an early retirement benefit or an optional form of benefit. *See id.*

Observing that the REA also provided protection for retirement-type subsidies, the court noted:

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[6] Independent research has found that these three opinions cited by the appellants are the only court opinions which arguably support their appeal.

> The bill provides that the term 'retirement type subsidy' is to be defined by Treasury regulations. The committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy. The committee expects that Treasury regulations will prevent the recharacterization of retirement-type benefits as benefits that are not protected by the provision.

Id. at 333-34 (citing S. Rep. No. 575 at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576). Without further discussion, the court determined the plant shutdown benefits did not fall within the category of a retirement-type subsidy as contemplated by the legislative history of the REA. *See id.* at 333.

In *Roper*, the Court of Appeals for the Eleventh Circuit considered a pension plan that provided benefits to employees whose service was interrupted by a plant shutdown, lay-off or disability. *See Roper*, 859 F.2d at 1473. The Roper court, however, addressed the plan within the context of ERISA section 206(a) and not section 204(g). *See id.*[7] Thus, although the court found it was not necessary to its decision to address *Ross*, it noted that *Ross* supported its conclusion that a plant

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[7] ERISA section 206(a) provides, in relevant part, "[i]n the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service . . . before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury." 29 U.S.C. § 1056(a).

shutdown benefit is not an early retirement benefit. *See id.* at 1474.[8]

The *Blank* court also addressed a benefits plan that provided benefits to participants meeting certain age and service requirements separated from their employment as a result of layoffs or disability. *See Blank*, 758 F. Supp. at 698. The court stated that " [t]he accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance benefits." *Id.* at 700 (quoting *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983)) (relying upon case decided prior to passage of REA and not addressing the anti-cutback provisions of section 204(g)).[9] In a

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[8] As relevant to this appeal, other than citing *Ross*, the *Roper* court did not provide any analysis of section 204(g) and the definition of early retirement benefit or retirement-type subsidy. As noted by the *Roper* court, section 206(a) only applies when a plan participant is separated from service with a nonforfeitable right to an accrued benefit. *See Roper*, 859 F.2d at 1473-74. The primary basis for the decision of the *Roper* court was not that the plant shutdown benefits were not an early retirement benefit, but rather that the plan did not provide for a nonforfeitable benefit because it encompassed factors other than age and service. *See id.* (adopting the reasoning of the district court). Accordingly, the *Roper* decision is not precedential on this appeal.

[9] *Blank* also cited to our opinion in *Hlinka*, 863 F.2d 279, as standing for the proposition that the plant shutdown benefits at issue in *Blank* were not an accrued benefit. While we did find that such a plan was not an accrued benefit, *see Hlinka*, at 284-85, we were not concerned with the application of amended section 204(g). *See id.* at 285 n.10. Given that the general ERISA definition of accrued benefits is linked to benefits commencing at normal retirement age, *see* 29 U.S.C. § 1002(24), our result was clearly appropriate. What we did not address in *Hlinka*, however, was the fact that for purposes of section 204(g) early retirement benefits and retirement-type subsidies are defined as being accrued, at least for purposes of that section. Thus, while an early retirement benefit may not be considered accrued for some purposes, it may be an accrued benefit for purposes of the anti-cutback rule of section 204(g). *Blank* did not discuss the import of this distinction.

footnote, the court stated that its conclusions were not affected by the application of section 204(g). *See id.* at 700 n.3.

Given that *Hlinka* did not address the application of section 204(g), its holding is not controlling in this case. Further, the analysis of *Hlinka*, which is limited to the observation that the concept of accrual is defined in relationship to normal retirement age, is rendered inapplicable in this case by the passage of the REA. *See* 29 U.S.C. § 1054(g) (defining early retirement benefits and retirement-type subsidies as accrued benefits despite fact they commence prior to normal retirement age).

d. Cases Finding Job Separation Benefits Are Accrued Benefits

The reported cases found to support the proposition that job separation benefits may be treated as accrued benefits for purposes of section 204(g) are *Harms v. Cavenham Forest Industries, Inc.*, 984 F.2d 686, *Wallace v. Cavenham Forest Industries, Inc.*, 707 F. Supp. 455 (D.Ore.1989), and *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 67 F.3d 1462 (9th Cir. 1995).[10] We set forth their reasoning below.

In *Wallace*, the district court addressed supplemental benefits that were provided "in lieu of Early Retirement Benefits and Vested Benefits to eligible Participants who were involuntarily separated under the Severance Program." *Wallace*, 707 F. Supp. at 459. These benefits were found to be payable for life, and thus continued beyond normal retirement age. *See id.* at 460. The court reasoned that:

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[10] The court of appeals vacated its decision in *Richardson* when it granted a petition for rehearing in that case. *See Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982 (9th Cir. 1997). On rehearing, the court decided that there had not been a plan amendment and therefore did not reach the issue of whether shutdown benefits were accrued benefits protected by section 204(g). *See id.* at 987. Accordingly, while we note that the court's original opinion does not have precedential value, its subsequent opinion did not undermine the logic of its earlier ruling.

> The fact that the [supplemental] benefits are offered 'in lieu of Early Retirement Benefits and Vested Benefits' does not require the court to conclude that they are not retirement-type benefits. This language only indicates that an eligible participant cannot receive both the special benefits provided . . . and the Early Retirement Benefits and Vested Benefits under the Crown retirement plan.
>
> The fact that eligibility is contingent upon involuntary separation does not require the court to conclude that [the supplemental benefits do] not provide retirement-type benefits. Eligibility for [supplemental] benefits is conditioned upon age and years of service as well as involuntary separation.

Id. The Wallace court concluded that the supplemental benefits were retirement-type benefits subject to the protections of section 204(g) of ERISA. *See id.*

Addressing the same plan at issue in *Wallace*, the Court of Appeals for the Fifth Circuit in *Harms* reached the same conclusion as had *Wallace*. The *Harms* court found it significant that the supplemental benefits were payable for life and were calculated similarly to general retirement subsidies—by multiplying the participant's final average pay figure by his or her years of service. *See Harms*, 984 F.2d at 692. *Harms* further concluded that the supplemental benefits were provided not as a form of severance benefit, but rather as a retirement-type subsidy. *See id.* Accordingly, the court determined that the supplemental benefits were subject to the protections of ERISA section 204(g). *See id.*

Richardson provides perhaps the most thorough analysis of whether shutdown benefits are protected as retirement-type subsidies by section 204(g). *Richardson* first noted that Congress indicated that it expected the Treasury Department to promulgate regulations defining the term "retirement-type subsidy." *See Richardson*, 67 F.3d at 1468. As noted, however,

the Treasury Department has yet to do so. *See id.* In that absence, *Richardson* observed that courts have held that a retirement benefit is a retirement-type subsidy if the sum of the monthly payments for the participant's life exceeds what the participant would have received as normal retirement benefits. *See id.* (citing *Ashenbaugh*, 854 F.2d at 1516 n.6; *Costantino v. TRW, Inc.*, 13 F.3d 969, 972 (6th Cir. 1994)).

The shutdown benefits addressed in *Richardson* consisted of two parts: (1) $400 per month, paid until age 62 and (2) an additional amount, equal to the normal retirement benefit, paid until death. *See id.* The court found that these shutdown benefits constituted a retirement-type subsidy because the sum of the monthly payments for life exceeded what the plan participants would have received as normal retirement benefits. *See id.*

The *Richardson* court found that the legislative history for section 204(g) supported this conclusion. *See id.* Quoting from the Senate Report, the court noted that:

> a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy.

Id. (quoting S. Rep. No. 575 at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576). The court read the Senate Report to mean that shutdown benefits that do continue after retirement age are a retirement-type subsidy.[11] *See id.* The pension plan,

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[11] The *Richardson* court declined to follow *Ross*, 847 F.2d 329, where the Court of Appeals for the Sixth Circuit read the Senate Report as stating that shutdown benefits never can be included in the definition of "retirement-type subsidy." *See Richardson*, 67 F.3d at 1468 n.4. The

however, argued that the shutdown benefits there at issue did not continue after retirement age because at age 62 the participants stop receiving the $400 per month and then received only the same amount per month as they would have received if they had retired at age 62. *See id.* According to the pension plan, then, the subsidy ended at normal retirement age. *See id.*

The court found that argument unavailing. *See id.* at 1469. The shutdown benefits that a plan participant received upon a plant shutdown were found not to be miraculously transformed into normal retirement benefits when the recipient reached age 62. *See id.* Rather, the plan participants received shutdown benefits from the time the plant closed until death. *See id.* While the amount of shutdown benefits the plan participant was entitled to receive was calculated by reference to normal retirement benefits, the court held that that circumstance did not transform the shutdown benefits into normal retirement benefits. *See id.*

The *Richardson* court found additional support for its conclusion in Treasury Department General Counsel Memorandum 39869 addressing section 411(d)(6) of the Internal Revenue Code. *See id.* The GCM defined different types of shutdown benefits as follows:

> Some shutdown benefits are provided in a form similar to severance benefits. They are short-term in nature and are a supplement or replacement of the participant's income during the period of unemployment. These benefits are provided for

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court believed that if Congress had wanted to indicate that shutdown benefits were not retirement-type subsidies, it would have said so. *See id.* By contrast, Congress said only that a shutdown benefit "that does not continue after normal retirement" was not a retirement-type subsidy. *See id.* That statement, in conjunction with Congress's general assertion that a subsidy that continues after retirement is a retirement-type subsidy, strongly implies that shutdown benefits that do continue after retirement age are retirement-type subsidies. *See id.*

> a limited period of time after the termination of the individual's employment and the amount of the benefit is generally determined either as a flat amount or as a multiple or fraction of the individual's annual compensation. . . .
>
> Alternatively, shutdown benefits may continue beyond normal retirement age, i.e., retirement-type benefits. Generally, shutdown benefits provide an incentive to employees who are at or near normal retirement age to retire at the time of a plant shutdown. For example, the employer . . . may supplement the accrued benefit of the individual.

Id. (quoting GCM 39869). Accordingly, the court concluded that the shutdown benefits there at issue continued after normal retirement age, and thus were retirement-type subsidies for purposes of section 204(g). *See id.*

In *Richardson* the pension plan also argued that even if the shutdown benefits were retirement-type subsidies, plan participants were not protected by section 204(g) because their benefits did not accrue before the amendment. *See id.* That is, the shutdown did not occur until after the pension plan eliminated the shutdown benefits. *See id.* The court rejected this argument. *See id.*

The *Richardson* court found that section 204(g) explicitly provides protection against amendment of retirement-type subsidies so long as the participant satisfies the preamendment conditions for the subsidy "either before or after the amendment." *Id.* Further, the court observed that an IRS revenue ruling concerning retirement-type subsidies under IRC § 411(d)(6) states that "[a] participant could, after the date of the proposed [amendment], satisfy the [preamendment] conditions necessary to receive this retirement-type subsidy." *Id.* (citing Rev. Rule 85-6, 1985-1 C.B. 133). Because the shutdown benefits were found to be a retirement-type subsidy, section 204(g) precluded the pension plan from eliminating them. *See id.*

e. IRS GCM 39869 [12] .

IRS General Counsel Memorandum 39869, dated April 6, 1992, addressed two issues relevant to the instant appeal: (1) whether shutdown benefits may be provided in a qualified pension plan, and (2) if shutdown benefits may be provided in a qualified plan, whether they are accrued benefits protected under IRC § 411(d)(6). See GCM 39869, IRS Pos. (C.C.H.) ¶ 2351 at 7851 (Apr. 6, 1992). The IRS found that shutdown benefits may be provided in a qualified plan, but found that they were not subject to the anti-cutback provisions of section 411(d)(6) until the occurrence of the contingent event—i.e., the plant shutdown.

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[12] Appellants argue that we should defer to the IRS's interpretation of section 411(d)(6) as set forth in GCM 39869 and a favorable determination letter from the IRS stating that the plan here at issue did not violate section 411(d)(6). *See* Appellant Br. at 18-30. As we have noted, due weight is given to the IRS's interpretation of its statute, and such decisions are not disregarded unless they conflict with the statute they purport to interpret or its legislative history, or if they are otherwise unreasonable. *See Gillis*, 4 F.3d at 1145. Nevertheless, inasmuch as we find that the IRS's interpretation is in conflict with the statute and its legislative history, we do not defer to either GCM 39869 or the favorable determination letter. Our decision to accord little weight to GCM 39869 is consistent with the Supreme Court's recent statement that an agency's interpretations, which are not the product of a formal adjudication or notice-and-comment rulemaking, are entitled only to respect, not deference, to the extent that those interpretations have the power to persuade. *See Christensen v. Harris County*, — U.S. —, 120 S. Ct. 1655, 1662-63 (2000). As noted, the IRS's departure from the express language of the statute and its legislative history renders GCM 39869 unpersuasive on the points most relevant to this appeal.

We also note that Bellas argues that under an IRS manual, General Counsel opinions "do not represent the positions of the [IRS]" and thus appellants "strive[ ] to puff [GCM 39869] into something it is not." *See* Appellee Br. at 13. Inasmuch as we depart significantly from GCM 39869, we see no reason to consider the limitations the IRS places on such a memorandum.

As to the first issue, the IRS stated that the determination of whether shutdown benefits may be provided in a qualified pension plan is not dependent solely on the event that triggers the payment of the benefit, but rather on the terms of the benefit, including the form of the benefit that is being provided. *See id.* at 7853. For example, shutdown benefits that are retirement-type benefits may be provided under a qualified pension plan. Benefits that become payable because of a plant shutdown and are in the form of annuity payments that continue after retirement age were found to be retirement-type subsidies that could be provided under a qualified pension plan. *See id.* at 7854.[13]

In addition, the IRS indicated that shutdown benefits that are ancillary benefits (i.e., social security supplements) also could be provided. *See id.* at 7854. These benefits must satisfy any necessary requirements to be considered an ancillary benefit (e.g., a social security supplement must satisfy the requirements of IRC § 411(a)(9) and section 1.411(a) 7(c)(4) of the regulations). Shutdown benefits that are merely layoff or severance-type benefits, however, may not be provided in a qualified pension plan. *See id.* at 7853.

As to the second issue, the IRS found that shutdown benefits that are retirement-type benefits, and not ancillary benefits, become accrued benefits and therefore are protected benefits under section 411(d)(6) only upon the occurrence of the event that triggers the right to payment of benefits (i.e., the contingent

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[13] The IRS indicated that the determination of whether a shutdown benefit may be provided in a qualified pension plan should focus on the form of benefit. *See id.* at 7853. Shutdown benefits may be provided by an employer for a number of reasons. For example, if the employer is concerned that the employees may need some time to find a new position, the employer may want to provide each employee with a short-term replacement of income for several months or more. Alternatively, if the employees are near retirement age, the employer may prefer to supplement their retirement benefits.

event). *See id.* at 7855. Section 411(d)(6) provides that a qualified pension plan shall not be treated as satisfying section 411, and therefore is not qualified under IRC § 401(a), if the accrued benefit of a participant is decreased or eliminated. *See* IRC § 411(d)(6).[14] Pursuant to GCM 39869, if shutdown benefits are provided as retirement-type subsidies, they are accrued benefits and therefore are protected under section 411(d)(6). *See id.* at 7855. Shutdown benefits, however, that are provided as ancillary benefits are not protected benefits under section 411(d)(6).

The IRS determined that shutdown benefits that are retirement-type benefits, and are not ancillary benefits, become an accrued benefit protected under section 411(d)(6) upon the occurrence of the event that triggers the right to the benefits. *See id.* at 7855. The IRS believed that this conclusion was consistent with the treatment of shutdown benefits as unpredictable contingent event benefits for purposes of the funding requirements under IRC § 412. *See id.* at 7855. In determining a defined benefit plan's current liability for purposes of the funding requirements under section 412, unpredictable contingent event benefits are not taken into account until the event on which the benefit is contingent occurs. *See* IRC § 412(l)(7)(B).

The IRS stated that the legislative history of section 412(l) states that shutdown benefits are unpredictable contingent event benefits, citing H.R. Rep. No. 391, 100th Cong., 1st Sess. 987 (1987), *reprinted in* 1987 U.S.C.C.A.N. at 2313-1, 2313-604; S. Rep. No. 63, 100th Cong., 1st Sess. 171-72 (1987) in this regard. *See id.* at 7855. Because shutdown benefits are considered to be unpredictable contingent event benefits under

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[14] Plan qualification is important because of the various tax benefits afforded qualified plans which will be lost if a plan is disqualified, and because of other adverse consequences following disqualification. *See, e.g.*, IRC §§ 402(b), 404(a) & 501(a).

section 412(l), a qualified pension plan is not required to fund for shutdown benefits until the triggering event occurs.

The IRS found that treating a shutdown benefit as an accrued benefit, and therefore as a section 411(d)(6) protected benefit at the time that the triggering event occurs was consistent with the treatment of this benefit as an unpredictable contingent event benefit for purposes of the additional funding requirements under sections 412(l) and 412(c)(7). *See id.* at 7855. The plan's definition of the shutdown benefit generally will determine the occurrence of the contingent event. For example, a plan may provide that shutdown benefits will be offered to all affected participants upon the resolution by the board of directors to close a facility. The IRS determined that in such a case the resolution by the board would be the event that triggers the shutdown benefit. *See id.* at 7855. Other plans may provide that the actual termination of operations at a particular facility is the triggering event. The IRS stated that a plan's description of a specific event is also the triggering event for determining when the shutdown benefit becomes a section 411(d)(6) protected benefit.

f. Our Conclusions

After careful analysis of the arguments presented and the cited authority, we hold that unpredictable contingent event benefits that provide a benefit greater than the actuarially reduced normal retirement benefit are retirement-type subsidies, and therefore are accrued benefits under section 204(g), if the benefit continues beyond normal retirement age. Such benefits are accrued upon their creation rather than upon the occurrence of the unpredictable contingent event. Our result is consistent with both the language of section 204(g) and its legislative history. For the reasons we set forth below, we do not adopt the contrary case law we have discussed above and contrary portions of the analysis contained in GCM 39869.

As an initial matter, the concept that all plant shutdown benefits or any similar contingent benefit, cannot be a protected retirement-type subsidy runs contrary to the legislative history of section 204(g). As noted in the Senate Report, "a subsidy that continues after retirement is *generally to be considered a retirement-type subsidy*." S. Rep. No. 575 at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576 (emphasis added). The Senate Report considered only a plant shutdown benefit that does not continue after normal retirement age not to be a retirement type subsidy. *See id.* Thus, the Senate Report clearly suggests that plant shutdown benefits that continue after normal retirement age are retirement-type subsidies—a conclusion consistent with Congress's intended general rule that subsidies continuing past normal retirement age are to be considered retirement-type subsidies.

Cases like *Roper*—and *Ross*, which relied upon *Roper*—use the Senate Report to reach the conclusion that plant shutdown benefits do not fall within the category of a retirement-type subsidy. *See, e.g., Ross*, 847 F.2d at 333-34. The *Ross* court, however, did not explain why, in the face of Congress's express intention, it chose to find that plant shutdown benefits never may be considered retirement-type subsidies. There is no discussion in *Ross* of whether the plant shutdown benefits there continued beyond normal retirement age. Accordingly, we believe that the *Ross* court's analysis of the issue does not provide a basis upon which to decide this matter.

In addition, the appellants' citation of *Blank* adds little to this case as the court there relied on pre-REA case law for the proposition that contingent early retirement benefits do not fall within ERISA's definition of accrued benefits. *See Blank*, 758 F. Supp. at 700. The *Blank* court relegated its discussion of post-REA section 204(g) to a footnote that does not address the statutory substance of the REA amendments. *See id.* at 700 n.3. Accordingly, *Blank* does not offer support for its conclusions with respect to ERISA as it is now written.

The overarching concept that emerges from the statute and the legislative history is that, in the proper circumstances, plant shutdown benefits that continue beyond normal retirement age should be treated as accrued benefits for purposes of section 204(g). As stated, the Senate Report addressing the amendment of section 204(g) suggests that shutdown benefits continuing beyond normal retirement age are retirement-type benefits. *See* S. Rep. No. 575 at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576. Even GCM 39869, upon which the appellants heavily rely, notes that "benefits that become payable because of a plant shutdown and are in the form of annuity payments that continue after retirement age are retirement-type subsidies. . . ." Given that there does not appear to be any relevant distinction between plant shutdown benefits and a more broadly defined contingent event benefit, we hold that contingent event benefits that continue beyond normal retirement age may be either early retirement benefits or retirement-type subsidies (or both) within the meaning of ERISA section 204(g). *See, e.g., Richardson*, 67 F.3d at 1468-69; *Harms*, 984 F.2d at 692; *Wallace*, 707 F. Supp. at 460.[15]

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[15] At oral argument, appellants suggested that the contingent event benefits here at issue should not be construed as retirement benefits protected by Section 204(g). *See* Tr. at 50-52 (citing *Rombach v. Nestle USA, Inc.*, 211 F.3d 190, 192-94 (2d Cir. 2000)). We note that the *Rombach* court addressed disability benefits provided in a pension plan. Such benefits were found to constitute a "welfare plan" and not a pension plan protected by section 204(g). *See id.* Accordingly, the issue presented to the *Rombach* court is distinguishable from the issue presented on this appeal. The PJS Benefits provided in the Westinghouse Plan are not a temporary benefit provided in the event of unemployment, but rather provide covered employees with the option of retiring early rather than experiencing a period of unemployment. Such a benefit is not a welfare plan, but rather falls within the definition of a pension plan. *See* 29 U.S.C. § 1002(2)(A); *see also* GCM 39869 (finding that certain plant shut down benefits were properly considered to be part of a pension plan subject to anti-cutback provisions); *cf.* S. Rep. No. 575 at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576 (stating that when plant shut down benefit does

Appellants argue that even if section 204(g) protects contingent event benefits that continue beyond normal retirement age, such benefits may not be considered accrued until after the contingent event has occurred. *See* Appellant Br. at 16-30; *see also Amicus* Br. at 12-24. In support of this proposition, appellants rely primarily upon GCM 39869. But we believe that to the extent that GCM 39869 determined that plant shutdown benefits are not accrued benefits until after the occurrence of the contingent event, it is in conflict with the express terms of IRC § 411(d)(6) and the legislative history of its ERISA counterpart, section 204(g).

On this point, the district court in this matter stated:

> I further find that the Defendants' argument that an unpredictable contingent event benefit such as the PJS benefit, is not protected until the contingent event occurs, is without merit in that it (and the authority it relied on) reads into the relevant statute a limitation on the protection of retirement-type benefits that simply is not supported by either the statutory language or the legislative history of § 204(g). More specifically, first, no where in plain language of § 204(g) is there any distinction made between 'contingent' and 'non-contingent' retirement-type subsidy benefits. Second, the legislative history of the amendment to § 204(g) expressly states that the amendment was designed to 'protect[ ] the accrual of benefits with respect to participants who have met the requirements for a benefit as of the time a plan is amended and *participants who subsequently meet the pre-amendment requirements*. *See* S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574 (emphasis added). Additionally, such a conclusion seemingly would be in direct opposition to the Third Circuit court's view of § 204(g) in *Dade, supra*, wherein after noting

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not continue beyond normal retirement age it will not be considered a retirement-type subsidy).

> that the early retirement benefit at issue was a retirement-type subsidy, the court explained, without any limitations, that after the amendment to § 204(g) in 1984, while 'a plan sponsor could prospectively eliminate an early retirement benefit by amendment . . . the amendment could not adversely affect the early retirement benefit of a plan participant who satisfied the pre-amendment conditions for the benefit either before or after the amendment' and '[t]hus, if [the plan sponsor] had adopted such an amendment, it would have had to allow those employees who remained in its employ after the amendment to "grow into" the benefit.'

Bellas, 73 F. Supp. 2d at 509 (citing *Dade*, 68 F.3d at 1562).

The district court was correct in noting that there is nothing in the language of section 204(g), or its legislative history, to suggest that a contingent event benefit accrues only upon the occurrence of the contingency. The plain language of the statute reveals that once a benefit is found to be a retirement-type subsidy, it is considered an accrued benefit. *See* ERISA section 204(g), 29 U.S.C. § 1054(g). The concept expressed in GCM 39869, that a benefit can be considered a retirement-type subsidy and yet not accrue until the occurrence of some later event, reads additional requirements into the language of section 204(g)—requirements for which there does not appear to be any support.

As the Senate Report made clear, the committee expected that any regulations defining the term retirement-type subsidy would prevent the recharacterization of retirement-type benefits as benefits that are not protected by section 204(g). *See* S. Rep. No. 575 at 30, reprinted in 1984 U.S.C.C.A.N. 2547, 2576. By grafting on the requirement that the contingency must occur before certain retirement-type benefits may be protected, the IRS in GCM 39869 has undertaken just such a recharacterization. GCM 39869 appears to concede that plant shutdown benefits that continue beyond normal retirement age may be retirement-type subsidies, yet at the same time removed

such subsidies from any meaningful protection by finding that such benefits did not accrue until the contingent event occurs. The legislative history, however, calls for an inclusive definition of the term retirement-type subsidy. Accordingly, we will not impose an artificial condition, such as suggested by appellants, that would have the effect of rendering unprotected a benefit that is clearly retirement in nature.

Appellants also argue that the concept of accrual connotes a benefit that accrues over time by reference to an employee's age, years of service, and years of participation. *See* Appellant Br. at 23-24. There can be no disputing this point. Appellants proceed to argue, however, that shutdown benefits do not steadily accrue in this sense, but rather are triggered by an unpredictable event such as a qualifying termination for lack of work. This argument, however, misses its mark.

Appellants appear to have imposed the concept of eligibility on the concept for accrual. While it is true that a plan participant may not be eligible to receive a shutdown benefit until the contingent event occurs, that circumstance by no means indicates that the value of that benefit has not been increasing over time in relationship to the participant's years of service under the plan, as in the case of a normal retirement benefit. The fact that a participant may not be eligible to receive payments until reaching the age of 65 does not mean that his or her retirement benefit does not accrue until the age of 65. Rather, as is commonly accepted, and as defined in ERISA section 3(23), normal retirement benefits accrue over time prior to the date of eligibility.

The fact that contingent event benefits accrue over time is bolstered by review of the Westinghouse Plan. The value of the PJS Benefits provided under the Westinghouse Plan is linked to the value of the participant's normal retirement benefit. *See* Westinghouse Plan § 20.B.2(a), J.A. at 74. Accordingly, the value of these benefits is linked directly to a participant's years of service and participation and may be calculated at any point in

time. While a participant may not be entitled to receive this value until the contingent event occurs, that does not mean that such benefits do not accrue, as that term is commonly understood.

Appellants point to principles of actuarial practice to support their construction of section 204(g). *See* Appellant Br. at 25-28. Actuaries routinely treat traditional early retirement benefits (those dependent upon age and service only) as benefits that accrue at a fixed rate over time. *See id.* at 25 (citing Actuarial Standards Board, Actuarial Standards of Practice No. 4, at 25-26 (1993)). On the other hand, because shutdown benefits are contingent upon unpredictable events, they largely have defied conventional actuarial principles. *See id.* at 25-26. As a result, under ERISA, as amended by the Omnibus Reconciliation Act of 1987, unpredictable contingent event benefits are not taken into account in determining a plan's current liability and related funding obligations until after the contingent event occurs. *See* 29 U.S.C. § 1082(d)(7)(B); IRC § 412(l)(7)(B). Appellants argue that construing the anti-cutback rule not to apply to shutdown benefits until the occurrence of the unpredictable contingent event—and recognizing that, until then, shutdown benefits are more in the nature of insurance than anticipated benefits—advances one of the central objectives of ERISA: ensuring adequate funding for all vested and accrued benefits. *See* Appellant Br. at 26-27 (citing 29 U.S.C. § 1001(a); *Nachman Corp.*, 446 U.S. at 374-75).

While the construction of section 204(g) proffered by appellants would lend some consistency between section 204(g) and ERISA's funding provisions, it does not appear that the statute or its legislative history requires or compels such consistency. Appellants assert that until the contingent event occurs, shutdown benefits are more akin to insurance than an anticipated benefit. *See* Br. at 26-27. Under this logic, appellants appear to suggest that the occurrence of the contingent event somehow transforms insurance into a retirement benefit. As we stated above, however, Congress

discouraged this attempt at recharacterizing retirement-type benefits.

In addition, we see no compelling need for consistency in this regard as the appellants urge. The question of whether a contingent event benefit is protected from reduction or elimination does not appear to be connected with the concept of funding in either ERISA or the IRC. Accounting and actuarial guidelines represent an attempt to account for real life events in the best manner possible. Hence, unpredictable contingent event benefits are not calculated into a plan's current liabilities because there is no means of knowing when and if such an event ever will occur. We do not understand why this circumstance need be related to the question of whether such benefits are protected from reduction or elimination.

Appellants suggest that employers will face problems funding for contingent event benefits given that ERISA and the IRC require funding to be based upon reasonable actuarial principles. *See* Appellant Br. at 27 (citing 29 U.S.C. § 1082(c)(3); IRC § 412(c)(3)). But if we concluded that such benefits are not protected by section 204(g) until the contingent event occurs, our result would not alleviate this problem. The problem cited by appellants will exist regardless of whether the contingent event benefit is maintained as a result of the plan's own terms or simply is a product of the operation of section 204(g)'s anti-cutback provisions. Accordingly, the appellants' actuarial and funding arguments have no bearing on the determination of when contingent event benefits become protected under section 204(g).[16]

When contingent event benefits are provided to continue beyond the normal retirement age, they are an early retirement

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[16] We also note that to the extent the value of the PJS Benefits here is determined in relationship to the normal retirement benefit, they always will be at least partially funded. Thus, the funding concerns appellants raise are not as serious as they would have us believe.

benefit within the scope of section 204(g) and are accrued benefits within that section. Moreover, under section 204(g), once a benefit is found to meet the definition of a retirement-type subsidy it is to be considered an accrued benefit within that section. Accordingly, for purposes of the anti-cutback provisions of ERISA, such benefits are protected by section 204(g) with respect to employees within the pension plan after their creation and not upon the occurrence of the contingent event.

In this matter, the version of the Westinghouse Plan before its amendment provided that "[a]n Employee . . . may retire" on the first day of the month following the month in which an employee's employment was terminated as a result of a Permanent Job Separation. *See* Westinghouse Plan § 20.A, J.A. 74. In order to retire after a Permanent Job Separation, an employee must have satisfied one of the age and service combinations set forth below:

— Age 50 or over with 25 or more years of Eligibility Service;

— Age 51 or over with 22 or more years of Eligibility Service;

— Age 52 or over with 19 or more years of Eligibility Service;

— Age 53 or over with 16 or more years of Eligibility Service;

— Age 54 or over with 13 or more years of Eligibility Service;

— Age 55 or over with 10 or more years of Eligibility Service.

See id. § 20.B.1.

The amount of monthly pension payable to an employee satisfying the above requirements was the sum of (1) the

employee's normal retirement benefit, (2) $10.00 multiplied by the employee's Credited Service, and (3) an additional $100.00 if the employee had 25 years of Eligibility service, and his Special Retirement Date was on or before September 1, 1994. *See id.* § 20.B.2 (a-c). The normal retirement benefit was to be paid for the lifetime of the employee, but the additional dollar amounts were payable only until the employee reached the age of 62.[17] Appellants and amicus argue that none of the benefits provided under the Westinghouse Plan continue beyond normal retirement age. *See* Appellant Br. at 30-34; *Amicus* Br. at 3-11.

The district court, in addressing this issue stated:

> I find that because Subsection 20.B.2 (a) of the pre-1994 version of the Plan provided that the monthly amount of the PJS benefit included 'any amounts computed pursuant to Section 4 of the Plan [the normal retirement pension provision of the Plan]' without any actuarial reduction, even though the participant was retiring at an age which would not normally entitle him or her to the normal retirement pension provided under the terms of the Plan without any actuarial reduction and further states in Subsection 20.B.3 that '[t]he amount calculated in accordance with Subsection 20.B.2(a) shall be payable for the lifetime of the Employee,' that, at the

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[17] Because the $10.00 multiplied by Credited Service and the additional $100.00 benefit do not continue beyond normal retirement age, they cannot properly be considered a retirement-type subsidy as contemplated by section 204(g). Accordingly, those benefits properly could be the subject of amendment or elimination without violating section 204(g). Neither the district court nor the parties to this appeal have expended much time addressing these benefits. Rather, the parties and the district court focused on the Westinghouse Plan's provision for the payment of normal retirement benefits without any actuarial reduction. In addition, Bellas did not satisfy the condition set forth in the Westinghouse Plan for receipt of the additional $100.00, namely that he retire on or before September 1, 1994. Because he failed to satisfy the conditions for the benefit, either before or after that amendment, Bellas has no protected right to this benefit under section 204(g). *See* 29 U.S.C. § 1054(g).

> very least, the amount of the PJS benefit 'computed pursuant to Section 4 of the Plan' (if not the entire PJS benefit) is: (1) a benefit pursuant to which 'more is provided . . . than any reasonable actuarial equivalent of the plan's normal retirement benefit' and (2) 'a subsidy that continues after retirement.' Therefore, the PJS benefit is 'a retirement-type subsidy' as that term is used in §§ 204(g) and 411(d)(6). *See Dade*, 68 F.3d at 1562, n.1; S. Rep. No. 575, 98th Cong., 2d Sess. 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.
>
> In so holding, I obviously disagree with the Defendants' position that the PJS benefit is not a protected retirement-type subsidy because the Plan provides that 'once the employee reached age 65 [the normal retirement age under the Plan], this pre-retirement subsidy ceased, and he or she received only the Plan's "normal retirement" benefit. It is a key fact that, when the employee reached age 65, he or she was entitled to nothing more than their normal retirement benefit.' Defendants' Supporting Brief, p. 6. The difficulty I have with the Defendants' argument is that 'Subsection 20.B.3 expressly provides that "[t]he amount calculated in accordance with Subsection 20.B.2(a) shall be payable for the lifetime of the Employee,'" not until the participant turned 65.

Bellas, 73 F. Supp. 2d at 508-09. The district court is clearly correct that, by its express terms, the Westinghouse Plan provides PJS Benefits that continue for the life of the participant. *See* Westinghouse Plan § 20.B.3.

The appellants and *amicus* argue that any subsidy provided by the Westinghouse Plan ends when the participant reaches normal retirement age, at which point the participant merely would receive his normal retirement benefit. *See* Appellant Br. at 32. Appellants argue that the PJS Benefits do not provide any increased value to a participant once that participant reaches normal retirement age.

The logic supporting the appellants' argument appears to be as follows. A plan participant is provided with his normal retirement benefit upon becoming entitled to his or her PJS Benefits. A participant would be entitled to this benefit, regardless of the permanent job separation, upon reaching normal retirement age. Accordingly, once a plan participant reaches normal retirement age, he or she is not receiving any increased value as a result of the permanent job separation. Therefore, any subsidy provided by the Westinghouse Plan must be viewed as ceasing upon a plan participant's reaching normal retirement age.

The appellants' argument, however, overlooks one key feature—PJS Benefits provide for the early payment of the normal retirement benefit without actuarial reduction. Normally, the early commencement of retirement benefits would be actuarially reduced. These reduced payments, begun earlier, would continue for life, the idea being that a greater number of smaller payments are actuarially equivalent to a smaller number of larger payments begun at normal retirement age. As mentioned, the Westinghouse Plan does not reduce the normal retirement benefit in the case of PJS Benefits, even though the payment of those benefits may begin as much as 10 years before normal retirement age. Thus, such payments have been subsidized to equal the non-actuarially-reduced normal retirement payment. It is this subsidy that continues for life.

Amicus attempts to buttress appellants' argument that the subsidy does not continue for life. *Amicus* explains:

> Pension benefits ordinarily are actuarially reduced when an employee elects to commence distributions prior to normal retirement age. The reduction is not a penalty; it simply adjusts the vested distributable amount to reflect that (1) an amount paid currently is worth more than the same amount paid later, (2) the periodic benefit is payable over a greater number of years, and (3) the risk that an employee will die before the payments commence is reduced. The actuarial

> reduction is calculated by determining the benefit amount that would be payable at normal retirement age (on the basis of the participant's service and compensation to the date of the early commencement), and multiplying the benefit payable at normal retirement age by a discount factor. . . .
>
> For example, a 55-year old employee who terminates employment with a vested monthly retirement benefit of $1,000 for life commencing at age 65 might be entitled to $400 per month for life commencing at age 55 after the actuarial reduction is made. A full actuarial subsidy, such as that provided under the PJS benefit, eliminates this actuarial reduction and so provides an employee with a level stream of benefits before and after normal retirement age, consisting of a monthly $1,000 subsidy until normal retirement age and the monthly $1,000 normal retirement benefit thereafter.

Amicus Br. at 5-6.

Amicus, however, has overstated its case and the data upon which it relies. Under its theory, a plan participant receiving a subsidized early retirement receives payments that consist wholly of the subsidy before retirement age and no subsidy after retirement age. While the data presented by amicus certainly establishes that the total value of the subsidy is less for the person who qualifies for the benefit at an age that is closer to normal retirement age, the data does not support the conclusion that payments made prior to normal retirement age consist wholly of a subsidy.

After reviewing the arguments raised by appellants and *amicus*, and the language of the Westinghouse Plan, we conclude that the district court correctly concluded that the PJS Benefits in the Westinghouse Plan continue beyond normal retirement age. As noted, the plan itself states that such benefits commence upon the special retirement date and continue for life. Because the Westinghouse Plan provides for a benefit that continues beyond normal retirement age, and is not actuarily

reduced by reason of its payment before the normal retirement age, it is a retirement-type subsidy protected by section 204(g) of ERISA. Consequently, to the extent CBS amended the Westinghouse Plan in 1994 to eliminate certain plan participants from eligibility for PJS Benefits, it violated section 204(g).

We note, however, that neither the district court nor any other court or body addressing the issue appears to have drawn a distinction between contingent event benefits that provide for an early retirement and those benefits that provide a retirement-type subsidy. The general practice is to consider the entire benefit provided to be a subsidy. That practice, however, appears to us to be contrary to the definition of retirement-type subsidy that we have adopted. We have considered only the excess in value of a benefit over the actuarial equivalent of the normal retirement benefit to be a subsidy. *See Dade*, 68 F.3d at 1562 n.1; *Ashenbaugh*, 854 F.2d at 1521 n.6. Accordingly, to the extent the Westinghouse Plan provided PJS Benefits that were not actuarially reduced, the value of the benefit over and above the actuarially reduced value is a retirement-type subsidy protected by section 204(g). The balance, i.e. that portion paid that is equal to the actuarially reduced normal retirement benefit, constitutes an early retirement benefit protected by section 204(g) but is not a retirement-type subsidy.[18]

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[18] This conclusion is consistent with the terms of the Westinghouse Plan, which defines the PJS Benefits in terms of allowing a plan participant to retire. It is also consistent with GCM 39869, which notes that rather than providing short term benefits to plan participants close to retirement age, a plan may offer an incentive for such participants to retire at the time of the plant shutdown. *See* GCM 39869. This is exactly what the Westinghouse Plan provides. Rather than offer some other form of severance to employees that are sufficiently close to retirement age, the Westinghouse Plan allows such employees to retire early. Accordingly, the PJS Benefits provided by the Westinghouse Plan should be viewed as a subsidized early retirement benefit, protected as an early retirement to the extent of the actuarially reduced value of the normal retirement and protected as a subsidy, to the extent the Westinghouse Plan provides a

Amicus expresses concern that shutdown benefits that have been written into plans on the expectation that they could be modified or removed prior to an actual plant shutdown under the result we reach, will become permanent features of those plans. This result, however, appears to express the intent of ERISA, at least as concerns shutdown benefits that are provided in the form of early retirement benefits or retirement-type subsidies. As noted, one of the purposes of ERISA was to protect an employee's interest in his or her retirement benefits. The "expectation" of companies cannot override the language of the statute.[19]

Additionally, *amicus* asserts that application of the anti-cutback rule to shutdown benefits prior to the occurrence of the triggering event would expose many plans to the threat of immediate disqualification for federal income tax purposes because adoption of an amendment that violates IRC § 411(d)(6) causes a plan to be disqualified. *Amicus* further asserts that such disqualification would occur regardless of whether an employer reasonably relied upon GCM 39869. There can be no doubt that these arguments are substantial and we recognize that there may be significant adverse tax consequences as a result of this opinion if relief from sources

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benefit of greater value than the actuarially reduced value of the normal retirement benefit.

[19] Other policy concerns militate against accepting the *amicus's* arguments. The ability to eliminate or remove a shutdown retirement benefit prior to an actual shutdown seems contrary to the goals of ERISA. If a company could provide for shutdown retirement benefits and then remove them prior to an actual shutdown, it could persuade its employees to stay on board to help overcome difficult financial times, secure in the knowledge that if the company fails they can retire, but nevertheless could remove such benefits when it became evident the company could not be saved. In the absence of ERISA, such actions may not have been legally problematic, but the intent of section 204(g) surely would take this option away from an employer.

other than this court is not granted. We hope that the appropriate authorities take note of this problem and take steps to alleviate it. Yet section 204(g), particularly when considered with the legislative history, compels us to reach our result.

Nevertheless, while we do not suggest that employers have not relied reasonably on GCM 39869, and thus are not entitled to tax relief, we point out that knowledgeable persons in this esoteric field might have been aware since 1989 that section 204(g) was subject to an interpretation contrary to that which the IRS later reached. *See Wallace*, 707 F. Supp. 455. The *Wallace* court issued its opinion more than three years before the IRS published GCM 39869. Further, the Court of Appeals for the Fifth Circuit in 1993 in *Harms*, 984 F.2d 686, and the Court of Appeals for the Ninth Circuit in 1995 in *Richardson*, 67 F.3d 1462, adopted the *Wallace* position.

Finally, *amicus* asserts that if we affirm the decision of the district court we will discourage employers from adding future shutdown benefits. We think that *amicus* overstates the impact of our opinion. The only shutdown benefits subject to the anti-cutback provisions under this opinion are those provided in the form of early retirements and retirement-type subsidies that continue beyond normal retirement age. If, notwithstanding this opinion, an employer desires to have the flexibility of providing shutdown benefits that it easily can modify or amend in a qualified plan, it still may provide ancillary shutdown benefits that do not continue beyond normal retirement age. *See, e.g.*, IRC § 1.401(a)(4)-4(3)(2) (defining ancillary benefit to include shutdown benefits not protected under section 411(d)(6)). Accordingly, the *amicus's* concern does not compel a conclusion different from the one we adopt.

III. CONCLUSION

For the reasons set forth above, we will affirm the order of the district court entered June 29, 1999. We find that the PJS Benefits offered under the Westinghouse Plan are both an early

retirement benefit and a retirement-type subsidy protected under section 204(g), to the extent that they include the lifetime provision of a normal retirement benefit commencing after a covered job loss. To the extent the Westinghouse Plan provided PJS Benefits that did not continue beyond normal retirement age, those benefits are not protected by section 204(g). We will remand the matter to the district court for further proceedings consistent with this opinion.

SHADUR, Senior District Judge, concurring:

Westinghouse Electric Corporation ("Westinghouse") fired its long-term employee Harry Bellas ("Bellas") on December 31, 1997. That was of course within Westinghouse's rights: Under the common law principles of at-will employment, an employer is free to terminate a 32-year employee—just as it is free to terminate a probationary employee with just a few months under his or her belt—for good reason, bad reason or no reason at all. But here it is more than worth noting that there was no Westinghouse "plant shutdown" or any other kind of "shutdown" involved at all—and that is the bizarre mischaracterization that appellants have attached to Bellas' layoff (his firing), and that has been referred to in the majority opinion at n.4 and then employed throughout the opinion. What or who was "shut down"? Bellas? Surely not.

Most importantly for present purposes, that acceptance of appellants' mischaracterization in the opinion has given them (and the amicus in the case) substantially more than their due, and has thus made the reaching of our panel's conclusions-though clearly correct-needlessly more difficult in terms of analysis. And that has in turn occasioned this separate concurrence.

For appellants to attach the "shutdown" label to Bellas' termination of employment, and then to attempt to use that label as a springboard for a flawed analysis, does more than violate the

home truth contained in one of the aphorisms ascribed to Abraham Lincoln:

If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't *make* it a leg.

After all, from an employee's perspective the occasion for his or her being fired is irrelevant—in Gertrude Stein terms, "a firing is a firing is a firing."[20] But from an employer's point of view, a plant shutdown is a major economic event (as an individual's layoff, or even a number of individual layoffs, need not be). And of course every employer is well aware of its employee turnover rates, so that although the prospect or timing of any individual employee's termination cannot be predicted, the inevitability of a reasonably anticipatable number of employee terminations can be. And that situation contrasts sharply with an entire plant shutdown, which is almost always an unusual and unpredictable event (at least far in advance) in a company's economic life.

It is thus no accident, I believe, that when Congress acted to overturn adverse judicial precedent by enacting the Retirement Equity Act (ERISA § 204(g)'s anti-cutback provisions), the Senate Report (which has been quoted in the majority opinion's section captioned Legislative History of Current Section 204(g),

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[20] There is no question that Bellas was fired, rather than some more euphemistic term such as "layoff" being applicable to his termination. Bellas' original notice from the employer's Benefits Access Center used the language of his being "involuntarily separated from Westinghouse," which was clear enough on its own, and Westinghouse's ultimate communication (which cut the cord conclusively after a short extension that it had granted from the original notice date) left no conceivable room for doubt (emphasis added):

> Previously you were notified of *permanent separation* effective August 27, 1997. You were subsequently informed that due to business conditions, your employment was extended.
>
> This letter is formal notification that your effective date of separation will be December 31, 1997.

and has also been expressly referred to in both *Ross v. Pension Plan For Hourly Employees of SKF Indus., Inc.*, 847 F.2d 329, 333 (6th Cir. 1988) and *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 67 F.3d 1462, 1468 (9th Cir. 1995)) proceeded to list and explain the types of benefits that an employer could continue to control and could hence modify despite the Section 204(g) amendment. Importantly, in the course of doing so the Senate Report referred *only* to "a plant shutdown benefit (that does not continue after retirement age)." It did not speak at all of an employer's right to alter such retirement benefits payable on an individual's retirement or other termination.

And it is relatedly worth noting that not one of the three decisions on which appellants seek to rely, and with which our panel has deliberately parted company in substantive terms, involved (as this case does) an individual layoff unassociated with a plant shutdown. Instead the two Court of Appeals decisions, *Ross* and *Roper v. Pullman Standard*, 859 F.2d 1472 (11th Cir. 1988) (*per curiam*), did involve plant shutdowns and the major employee displacements that such events create, while the District Court decision in *Blank v. Bethlehem Steel Corp.*, 758 F. Supp. 697 (M.D. Fla. 1990) involved the sale of a facility to a purchaser that did not take over the workforce in toto (thus also being much the equivalent, from the selling employer's perspective, of an unanticipatable plant shutdown).

In sum, the analysis and result that plainly favor Bellas in this case flow easily not only from the facts that the benefits at issue here were framed to continue after retirement age but also from the fact that such benefits are not even hinted at in the Retirement Equity Act or its legislative history as subject to modification by an employer that must deal with the post-statutory termination of an individual employee. Indeed, that conclusion should really follow a fortiori from the majority opinion's decision that the continuation of such a benefit beyond

retirement would also insulate a plant shutdown situation from the employer's attempted revision of that retirement benefit.

It is also significant, I suggest, that the General Counsel's Memorandum that was authored by an anonymous Internal Revenue Service lawyer—the GCM on which appellants seek to lay such heavy stress and that the majority opinion properly finds unpersuasive as a substantive matter—becomes an even weaker reed when looked at from the perspective set out here. That GCM speaks of "such shutdown benefits" in the everyday English meaning of an employer's closing of a facility or the like. Westinghouse's effort to bootstrap that notion into applying to every termination of every employee represents an unjustified quantum leap.

It is of course true that Bellas has shaped his Complaint as a putative class action to encompass all participants in the Westinghouse Plan who were laid off after January 1, 1997 under circumstances that meet the pre-Plan Amendment requirements for the type of pension claimed by Bellas, or even to encompass some Plan participants who are still employed. But because this appeal comes before us on an interlocutory basis before the issue of class certification has been addressed by the district court, it cannot now be known (for example) whether Bellas, with his own situation involving an entirely individual firing, would or would not qualify under the Fed. R. Civ. P. 23 standards of typicality or adequacy of representation for a class including such Westinghouse employees who might become affected in the future by a now-purely-hypothetical plant shutdown. Hence our panel's reaching out to address that hypothetical situation poses the problem always presented by judicial dictum: the prospect that when an actual controversy of that nature presents itself, it may present issues that no one has now anticipated fully, and that could therefore call for a different analysis (or even perhaps a different result).

For those reasons I would limit the present analysis and decision to the one before us in real-world terms: Bellas'

individual termination (although I do want to make it clear that my substantive analysis of the hypothetical plant shutdown situation, if we were properly called upon to reach it, would be no different from what has been said in the majority opinion). Accordingly I concur in the majority opinion to the extent of its materially less difficult resolution of the appeal as to Bellas' individual claim.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRUIT

August 19, 1999
D-116

No.99-8039

IN RE: Harry Bellas, Petitioner

PRESENT: MANSMANN, GREENBERG AND MCKEE, Circuit Judges

1. Motion by Petitioner for Petition For Permission To Appeal.

2. Response by Respondents To Petition For Permission To Appeal.

/s/ Susan M. Acerba
Case Manager (215) 597-3014

ORDER

The foregoing motion for permission to appeal is granted.

By the Court:

/s/ MIG
Circuit Judge

Dated: Sept. 10, 1999

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

HARRY BELLAS	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 98-1455
	)	
CBS, INC. and WESTING-HOUSE PENSION PLAN,	)	
	)	
	)	
Defendants.	)	

AMBROSE, District Judge

CERTIFICATION AND STAY ORDER

Upon consideration of Defendants' Motion to Certify Order for Interlocutory Appeal and Plaintiff's Response to it, the Motion is GRANTED. The Court adds the following statement to its June 29, 1999 Partial Summary Judgment Order:

> Pursuant to 28 U.S.C.§ 1292(b), the Court certifies that this Order involves a controlling question of law as to which there are substantial grounds for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. Pursuant to Local Rule 5.1 of the Third Circuit Local Appellate Rules, the Court further certifies that the controlling questions of law is as follows:
>
> > Whether the Permanent Job Separation benefit contained in the pre-1994 version of the Westinghouse Pension Plan is a retirement-type subsidy protected by Section 204(g) of ERISA, 29 U.S.C. § 1054(g).

It is further ORDERED that District Court proceedings in this matter be STAYED until the United States Court of Appeals for the Third Circuit resolves any timely petition for permission to appeal and any appeal allowed.

BY THE COURT:

/s/ DONETTA W. AMBROSE,
U.S. District Judge

Date: July 28th, 1999

73 F. Supp. 2d 500

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF PENNSYLVANIA

HARRY BELLAS,

Plaintiff,

vs.

CBS, INC. and WESTINGHOUSE PENSION PLAN,

Defendants.

No. CIV. A. 98-1455

June 29, 1999

OPINION and ORDER OF COURT

AMBROSE, District Judge.

Pending before the Court is the Motion for Partial Summary Judgment of Plaintiff Harry Bellas ("Bellas" or "Plaintiff"). Plaintiff's Complaint alleges a violation of ERISA § 204(g), 29 U.S.C. § 1054(g) both by Defendants CBS, Inc. ("CBS") and the Westinghouse Pension Plan ("the Plan") (collectively "Defendants") and an ERISA breach of fiduciary duty claim by Defendant CBS. For the reasons set forth below, the Plaintiff's Motion for Partial Summary Judgment is granted.

STANDARD OF REVIEW

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against the party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In considering a motion for summary judgment, this Court must examine the facts in a light most favorable to the party opposing the motion. *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence creates no genuine issue of material fact. *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir. 1987). The dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the non-movant's burden of proof at trial. *Celotex*, 477 U.S. at 322.

FACTS

Viewed in a light most favorable to Defendants, following are the material facts of record.[1]

Plaintiff alleges that Westinghouse Electric Corporation ("Westinghouse"), the predecessor by name change to Defendant CBS, impermissibly amended the Westinghouse Pension Plan ("the Plan") by first narrowing and then eliminating entirely a "Special Retirement Provision" applicable when a senior employee is terminated as a result of a "Permanent Job Separation." Plaintiff contends that said amendment has the

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[1] Although I will for purposes of this motion for summary judgment view any disputed facts in a light most favorable to Defendants, in reality, the facts relevant to this action are essentially undisputed by the parties.

effect of eliminating or reducing an early retirement benefit or an early retirement-type subsidy in contravention of the Retirement Equity Act ("REA") Amendments to ERISA, 29 U.S.C. § 1054(g) and § 411(d)(6) of the Internal Revenue Code, 26 U.S.C. § 411(d)(6). Plaintiff further claims that in adopting and implementing said amendment, CBS violated its fiduciary duties of acting solely in the interest of plan participants and beneficiaries, of administering the Plan in accordance with both the governing documents and instruments and ERISA, and of exercising care, prudence, and diligence in the performance of its responsibilities and thereby violated ERISA and the IRC.

The pre-1994 version of the Plan provided in Section 20 of the Plan a Special Retirement Provision for employees of CBS meeting stated age and service requirements who were terminated as a result of a "Permanent Job Separation" (the "PJS benefit"). More specifically, in Section 20 of the pre- 1994 version of the Plan, which is entitled, "Special Retirement Provisions," the Plan provided in relevant part:

> B. 1. An Employee whose employment is terminated as a result of a Permanent Job Separation, who at the time of such Permanent Job Separation does not satisfy any of the requirements for retirement pursuant to Section 2 of the Plan, may retire on his Special Retirement Date or on the first day of any month following his Special Retirement Date if, by the end of the calendar year in which he is separated, he would have satisfied one of the age-and-service combinations set forth below had he remained continuously employed to the end of such year:
>
> — Age 50 or over with twenty-five (25) or more years of Eligibility Service,
>
> — Age 51 or over with twenty-two (22) or more years of Eligibility Service,
>
> — Age 52 or over with nineteen (19) or more years of Eligibility Service,

— Age 53 or over with sixteen (16) or more years of Eligibility Service,

— Age 54 or over with thirteen (13) or more years of Eligibility Service,

— Age 55 or over with ten (10) or more years of Eligibility Service,

2. The amount of monthly pension payable to an Employee who satisfies the requirements set forth in Subsection 20.B.1 above shall be the sum of (a), (b) and (c) below:

(a) Any amounts computed pursuant to Section 4 of the Plan [Section 4 is entitled "Normal Retirement Pension"].

(b) Ten ($10.00) dollars multiplied by his Credited Service.

(c) If the Employee had twenty-five (25) years of eligibility Service and his Special Retirement Date is on or before September 1, 1994, an additional $100.

The amounts calculated in accordance with Subsection 20.B.2 above shall be based on the provisions of the Plan in effect on the Employee's Special Retirement Date.

3. The amount calculated in accordance with Subsection 20.B.2 (a) shall be payable for the lifetime of the Employee and shall be subject to all of the optional forms of payments described in Section 10.

4. The amounts calculated in accordance with Subsections 20.B.2 (b) and 20.B.2 (c) shall be payable up to and including the month in which the Employee attains his 62nd birthday. These amounts shall not be subject to any of the optional forms of payment described in Section 10, except the Lump Sum form described in Subsection 10.C.5.

Pre-1994 version of the Plan, Section 20, pp. 43-44. The term "Permanent Job Separation" was defined in the pre-1994 version

of the Plan in pertinent part as meaning "the termination of the employment of an Employee. . .through no fault of his own through lack of work for reasons associated with the business for whom [the employer] determines there is no reasonable expectation of recall." *Id.* at Section 1, p. 7. Further, the Summary Plan Description with respect to this provision explains:

> [t]he amount of your special retirement pension is the full amount you have earned to the date you are permanently separated. There are no reductions applied to your pension, even though you are retiring early. If you are under age 62, you receive a monthly early retirement supplement of $10 for each year of credited service. This supplement stops when you turn age 62.
>
> If you have at least 25 years of eligibility service, you receive an additional $100 per month until you turn age 62. This additional $100 per month is available only if your special retirement pension begins on or before September 1, 1994.

Pre-1994 version of the Plan Summary Plan Description, p. 14.

An amendment to the Plan, adopted by CBS on January 1, 1994 ("the Amendment"), altered participants' entitlement to the PJS benefit under the Plan in two respects: (1) the Amendment made it harder to qualify for the PJS benefit after January 1, 1997, by narrowing the definition of "Permanent Job Separation" to apply only if an employee's employment termination was due to a job movement, product line relocation, or location close-down and (2) the Amendment eliminated the PJS benefit *in toto* for terminations on or after September 1, 1998.[2] More specifically, the definition of the term "Permanent

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[2] With respect to the total elimination of the Special Retirement Pension after September 1, 1998, Defendants explain in their Opposition to Plaintiff's Motion for Summary Judgment, without providing any supporting documentation, that "[t]he Plan was amended in 1998 to

Job Separation" was defined in the 1994 version of the Plan, in relevant part, as follows:

> Permanent Job Separation means, for periods prior to January 1, 1997, the termination of the employment of an Employee with an Employer . . . through no fault of his own for lack of work for reasons associated with the business for whom such Employer . . . determines, on a uniform and nondiscriminatory basis, that there is no reasonable expectation of recall.
>
> . . . .
>
> For periods on or after January 1, 1997 and before September 1, 1998, a Permanent Job Separation means solely the termination of the employment of an Employee with an Employer . . . because of job movement or product-line relocation, or location closedown, as those terms are defined below. . . . Layoffs due to adjustments in the workforce caused by changes in production requirements, manufacturing processes, sales volume, inventory levels, make or buy decisions, decisions to discontinue a product line, or any other reasons associated with the business shall not be a job movement or product-line relocation. . . . In no event shall a Permanent Job Separation occur after August 31, 1998.

1994 version of the Plan, pp. 12-13.

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extend the 1994 PJS [Permanent Job Separation] benefit because of job movement or product-line relocation, or location closedown until the year 2000." Defendants' Opposition to Plaintiff's Motion for Summary Judgment, p. 6 n.7. For purposes of deciding this motion, it is immaterial whether or not the Amendment totally eliminates the Special Retirement Pension after September 1, 1998 because it is not disputed by Defendants that by amending the Plan to narrow the definition of "Permanent Job Separation," a participant's ability to receive a PJS benefit under the Plan was reduced.

Plaintiff was employed by CBS in the nuclear division of CBS from 1964 until December 31, 1997. He was a participant in the Plan at all relevant times prior thereto, including at the time of the adoption of the Amendment. Plaintiff was notified of the Amendment either in late 1994 or when the January 1, 1995 Summary Plan Description of the Plan was distributed.

Plaintiff's employment was terminated by CBS on December 31, 1997, through no fault of his own, through lack of work, for reasons associated with CBS's business and with no reasonable expectation of recall. At the time of his termination, Plaintiff was over 50 years of age and had thirty (30) years of service with Westinghouse/CBS.

Under the pre-1994 version of the Plan, upon his termination, Plaintiff would have satisfied all of the conditions necessary to receive the PJS benefit (i.e. age, years of service, and reason for termination).

The pre-1994 version of the Plan also contained a "Normal Retirement Pension" provision and an "Early Retirement Pension" provision. Pre-1994 version of the Plan, Sections 4-5, pp. 11-17.

LEGAL ANALYSIS OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

In his Motion for Partial Summary Judgment, Plaintiff asks this Court to rule as a matter of law that the Amendment in question violates the REA amendments to ERISA, set forth at 29 U.S.C. § 1054(g), and § 411(d)(6) of the Internal Revenue Code. I will address Plaintiff's motion for partial summary judgment as to the ERISA § 204(g) issue but as I do not read Plaintiff's Complaint to have alleged that Defendants violated 26 U.S.C. § 411(d)(6), I will not address Plaintiff's Motion to the extent it asks the Court to find as a matter of law that Defendants violated § 411(d)(6).

29 U.S.C. § 1054(g) is entitled "Decrease of accrued benefits through amendment of plan," and provides:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . .
>
> (2) For the purposes of paragraph (1), a plan amendment which has the effect of—
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in the regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfied (either before or after the amendment) the preamendment conditions for the subsidy.

29 U.S.C. § 1054(g).

In support of his position, Plaintiff argues that the PJS benefit qualifies both as (1) "an early retirement benefit" and "a retirement-type subsidy" as those terms are used in ERISA § 204(g) and therefore, by amending the Plan to reduce and then eliminate the PJS benefit, Defendants have violated ERISA § 204(g). Plaintiff's Reply to Defendant's Opposition to Motion for Partial Summary Judgment ("Plaintiff's Reply Brief"), p. 1. "Since the benefit commences earlier than 'normal retirement age' (i.e., as early as age 50 instead of the 'normal' age of 65), it is an 'early retirement benefit.' And . . . it is a 'retirement-type subsidy' since, under the provision, the participant receives the *same* monthly amount *for life* which he would have received at age 65 under the normal retirement provision." *Id.* at pp. 1-2.

In response to Plaintiff's Motion for Partial Summary Judgment, Defendants argue that the 1994 Amendment to the

PJS benefits did not violate the anti-cutback rule of ERISA § 204(g) because "[t]he anti-cutback rule does not protect benefits that are triggered by a contingent event outside the control of the employee" and "[t]he anti-cutback rule also does not protect plant shutdown and similar workforce reduction benefits that do not continue after normal retirement age." Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment ("Defendant's Reply Brief"), pp. 21-22. *See also id.* at p. 2 ("[g]iven the wholly contingent nature of the Plan's PJS benefit, it is not an early retirement benefit. Because it is a contingent benefit and because the subsidy it provides ceases at normal retirement age, it is not a retirement-type subsidy. Consequently, as a matter of law, the PJS benefit may be amended—as was done in 1994—or even reduced or eliminated completely."). Notably, with respect to their argument that under the pre- 1994 version of the Plan, the PJS benefit ended at age 65 the Defendants explain:

> For example, under the 1992 Plan, an employee age 50 or older with at least 25 years of service who was terminated as part of a permanent job separation before September 1, 1994 became entitled to a monthly supplemental benefit of $350, plus an amount equal to the unreduced normal retirement benefit. Once an employee reached age 62, the $350 component of this subsidized benefit ended and the employee thereafter received only a monthly amount equal to the unreduced normal retirement benefit payable at age 65. Then, once the employee reached age 65, this pre-retirement subsidy ceased, and he or she received only the Plan's "normal retirement" benefit. It is a key fact that, when the employee reached age 65, he or she was entitled to nothing more than their normal retirement benefit.

Id. at p. 6.

In reply to Defendant's "contingent" argument, Plaintiff contends that § 204(g) "mandates protection if the participant eventually 'satisfies . . . the pre-amendment *conditions*' either

before or after the amendment" and "does *not* specify that such 'conditions' can only be age and service." Plaintiff's Reply Brief, p. 2 (emphasis in original). Concerning the Defendant's contention that § 204(g) does not protect benefits that do not continue after normal retirement age, the Plaintiff argues that this argument is not applicable to the PJS benefit because said benefit is not a plant shutdown benefit and does continue after normal retirement age. *Id.* at pp. 9-13.

Thus, the issue before this Court pursuant to Plaintiff's Motion for Partial Summary Judgment is whether the PJS benefit contained in the pre-1994 version of the Plan constitutes either an "early retirement benefit" or a "retirement- type subsidy" that was protected from reduction or elimination by plan amendment.

A. Retirement-Type Subsidy.

I address first whether the PJS benefit qualifies as a retirement-type subsidy that was protected from reduction or elimination by plan amendment.

The United States Court of Appeals has provided some guidance on the issue at hand. In *Dade v. North American Philips Corporation*, 68 F.3d 1558 (3d Cir. 1995), the Third Circuit court examined a provision of a pension plan that provided that the plan's early retirement benefits would not be reduced [by 0.3% for each month their retirement preceded the normal retirement age] if the sum of the participant's age and years of eligible service was at least eighty- five. In pertinent part, the *Dade* court first explained that the benefit was an early retirement subsidy because "more is provided. . .than any reasonable actuarial equivalent of the plan's normal retirement benefit." *Id.* at 1562, 1562 n.1, quoting, Stephen R. Bruce, *Pension Claims Rights and Obligations*, 285 (1993), *citing, Ashenbaugh v. Crucible, Inc.*, 854 F.2d 1516, 1521 n.6, 1528

n.12 (3d Cir. 1988).[3] The *Dade* court further held concerning the meaning of § 204(g) that:

> [a]fter 1984, a plan sponsor could prospectively eliminate an early retirement benefit by amendment, but under § 204(g) the amendment could not adversely affect the early retirement benefit of a plan participant who satisfied the pre-amendment conditions for the benefit either before or after the amendment. Thus, if [the plan sponsor] had adopted such an amendment, it would have had to allow those employees who remained in its employ after the amendment to "grow into" the benefit. . . .

Dade, 68 F.3d at 1562. In *Hein v. F.D.I.C.*, 88 F.3d 210 (3d Cir. 1996), *cert. den'd*, 519 U.S. 1056 (1997), the appellate court explained that "ERISA § 204(g)(2) mandates accrual of [a participant's] unreduced early retirement benefits only if [the participant] at some point 'satisfied . . . the preamendment conditions for the subsidy'." *Id.* at 213 (internal citation omitted).

The following legislative history concerning the amendment of § 204(g) in 1984 to include the protection of, *inter alia*, "retirement-type subsidies," is also instructive in interpreting what constitutes a retirement-type subsidy for purposes of § 204(g) and § 411(d)(6). First, the legislative history explains that the amendment to § 204(g): "generally protects the accrual of benefits with respect to participants who have met the requirements for a benefit as of the time a plan is amended and participants who subsequently meet the preamendment

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[3] The *Ashenbaugh* court explained that the legislative history of § 204(g), as amended, defines a benefit subsidy as "the excess in value of a benefit over the actuarial equivalent of the normal retirement benefit" and that because the benefit at issue in *Ashenbaugh* provided a value in excess of the amount that would have been available to a retiring employee under the comparable actuarially-reduced normal retirement benefit provision, the excess value was a subsidy. *Id.* at 1521 n.6.

requirements. The bill does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment) has not met the preamendment requirements." S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574. The legislative history of the 1984 amendment to § 204(g) further provides:

> [t]he bill provides that the term "retirement-type subsidy" is to be defined by Treasury regulations. The Committee intends that under these regulations, a subsidy that continues after retirement is to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy. The committee expects that Treasury regulations will prevent the recharacterization of retirement-type benefits as benefits that are not protected by the provision.

Id. at S. Rep. No. 575, 98th Cong., 2d Sess. 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

26 U.S.C. § 411(d)(6),[4] § 411(d)(6) of the Internal Revenue Code ("IRC"), is essentially the same statute as § 204(g).

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[4] 26 U.S.C. § 411(d)(6) states:

> (d) Special Rules—
>
> (6) Accrued benefit not to be decreased by amendment-
>
> (A) in general.—A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan . . . .
>
> (B) Treatment of certain plan amendments.—For purposes of subparagraph (A), a plan amendment which has the effect of—

Qualified pension plans such as the instant Plan must comply with both the Internal Revenue Code and ERISA. As explained by the Third Circuit court in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1144 (3d Cir. 1993) "[w]hen interpreting ERISA's provisions we sometimes have the benefit of another source. Section 204(g) . . . has a mirror-like counterpart in the Internal Revenue Code ("IRC")." *See* 26 U.S.C. § 411(d)(6). Therefore, when interpreting § 204(g) of ERISA, in addition to the statute's legislative history, we may also look for guidance to sources which interpret its IRS counterpart. *Id.* at 1144. Accordingly, Internal Revenue Service ("IRS") General Counsel Memorandum ("GCM") 39869,[5] which examined "[w]hether shutdown benefits may be provided in a qualified pension plan" and "[i]f shutdown benefits may be provided in a qualified plan, are they accrued benefits that are protected under section 411(d)(6) and subject to the minimum survivor annuity requirements under sections 401(a)(11) and 417," is also of assistance in the case at bar. GCM 39869 provides, in relevant part, the following conclusions and supporting analysis:

> (i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (ii) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing [accrued] benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

26 U.S.C. § 411(d)(6).

[5] Plaintiff emphasizes that the GCM states that "[t]his document is not to be relied upon or otherwise cited as precedent by taxpayers." Id. While this is true, understanding how the Internal Revenue Service, the agency responsible for enforcing the Internal Revenue Code, has interpreted IRC § 411(d)(6) certainly is of assistance in deciding the difficult inquiry currently before the Court.

[s]hutdown benefits that are retirement-type benefits [for example, benefits that become payable because of a plant shutdown and are in the form of annuity payments that continue after retirement age] . . . become accrued benefits and therefore are protected benefits under section 411(d)(6) upon the occurrence of the event that triggers the right to payment of benefits (i.e., the contingent event).

. . .

shutdown benefits may continue beyond normal retirement age, i.e. retirement-type benefits. Generally, shutdown benefits provide an incentive to employees who are at or near normal retirement age to retire at the time of the plant shutdown. For example, an employer may reduce the age or service eligibility requirements for the normal retirement benefit, or may supplement the accrued benefit of the individual.

. . .

The provision of shutdown benefits in the form of a retirement-type benefit in a qualified pension plan was contemplated in the legislative history of the Retirement Equity Act of 1984 ("REA") and the Omnibus Budget Reconciliation Act of 1987 ("OBRA '87").

The legislative history of section 301 of REA, which amended section 411(d)(6), added the term "retirement-type subsidy" and discussed its intended meaning by stating that "a subsidy that continues after retirement is generally to be considered a retirement-type subsidy" and therefore, ". . . A SHUTDOWN BENEFIT (THAT DOES NOT CONTINUE AFTER RETIREMENT AGE) WILL NOT BE CONSIDERED A RETIREMENT-TYPE SUBSIDY." S. Rep. No. 575, 98th Cong., 2d Sess. 30 (1984) emphasis added. This language suggests that shutdown benefits that continue after retirement age are retirement-type benefits . . . .

Section 412(l), as added by section 9303(a)(1) of OBRA '87, provides for additional funding requirements for "unpredictable contingent event benefits." In discussing the meaning of this term, the legislative history states that these benefits are "contingent on an event other than age, service, compensation, death, or disability, or an event which is reasonably predictable (as determined by the Secretary)" and includes "benefits that depend on contingencies that, like facility shutdowns or reductions or contractions in the workforce, are not reliably and reasonably predictable. This event is not limited to events that are similar to shutdowns or reductions in [work] force." S. Rep. No. 63, 100th Cong., 1st Sess. 171-172 (1987). *See* also H.R. Rep. No. 391, 100th Cong., 1st Sess. 987 (1987) which provides similar language. It is clear from the legislative history that the special funding rules for unconditional contingent event benefits apply to shutdown benefits.

. . .

A. Under section 411(d)(6), an accrued benefit is a protected benefit and therefore the amount of the accrued benefit may not be decreased or eliminated.

Section 411(d)(6) provides that a qualified pension plan shall not be treated as satisfying section 411 . . . if the accrued benefit of a participant is decreased or eliminated.

. . .

if provided as retirement-type benefits, shutdown benefits are accrued benefits and therefor protected under section 411(d)(6).

. . .

B. Shutdown benefits that are retirement-type benefits . . . become an accrued benefit and therefore protected under section 411(d)(6) upon the occurrence of the event that triggers the right to the benefits (i.e., the

contingent event). This is consistent with the treatment of shutdown benefits as unpredictable contingent event benefits for purposes of the funding requirements under section 412.

In determining a defined benefit plan's current liability for purposes of the funding requirements under section 412, unpredictable contingent event benefits are not taken into account until the event on which the benefit is contingent occurs. *See* I.R.C. section 412(l)(7)(B).

The legislative history of section 412(l) is clear that shutdown benefits are unpredictable contingent event benefits. . . . Accordingly, because shutdown benefits are considered to be unpredictable contingent event benefits under section 412(l), a qualified pension plan is not required to fund for shutdown benefits until a triggering event occurs.

Thus, treating a shutdown benefit as an accrued benefit and therefore as a section 411(d)(6) protected benefit at the time that the triggering event occurs is consistent with the treatment of this benefit as an unpredictable contingent event benefit for purposes of the additional funding requirements under sections 412(l) and 412(c)(7).

. . .

The plan's definition of the shutdown benefit will generally determine the occurrence of the contingent event. . . . The plan's description of a specific event is also the triggering event for determining when the shutdown benefit becomes a section 411(d)(6) protected benefit.

C. If offered as a retirement-type subsidy in a qualified pension plan, shutdown benefits are accrued benefits that must be provided for in the form of a qualified joint and survivor annuity ("QJSA") and provide for a qualified preretirement survivor annuity ("QPSA").

. . .

> For purposes of section 411, a retirement-type subsidy is an accrued benefit.

GCM 39869 (April 6, 1992).

Additionally, also of assistance in this inquiry is a 1985 IRS revenue ruling with respect to the effect that termination of a plan that contained a retirement-type subsidy had on a plan's ability to satisfy § 411(d)(6). This revenue ruling, Revenue Ruling 85-6, explained: "[i]n the proposed termination of a qualified defined benefit plan, the plan will not satisfy section 411(d)(6), as amended by the Retirement Equity Act of 1984, unless an early retirement subsidy [based upon meeting specified years of service plus a certain age] is provided for participants who satisfy the pretermination subsidy requirements after the termination of the Plan" and "[t]he right of a participant under the plan to immediate payment without actuarial reduction, if [certain age and years of service conditions are met], is . . . a retirement-type subsidy subject to section 411(d)(6)(B) of the code. . . . A participant could, after the date of the proposed termination, satisfy the pretermination conditions necessary to receive this retirement-type subsidy." IRS Rev. Rule 85-6, 1985-1 C.B. 133. Notably, with respect to IRS revenue rulings in general and Revenue Ruling 85-6 in particular, the Third Circuit court has stated: "[w]e give weight to IRS revenue rulings and do not disregard them unless they 'conflict with the statute they purport to interpret or its legislative history, or if they are otherwise unreasonable.' Revenue Ruling 85-6 is reasonable and entirely consistent with Section 204(g) of ERISA and Section 411(d)(6) of the IRC. It is also consistent with the legislative history of the REA." *Gillis*, 4 F.3d at 1145.

Finally, as the parties' briefs amply illustrate, there is also case law to support the Plaintiff's and the Defendants' positions on this issue.

After careful consideration of the submissions of the parties in light of the terms of the pre-1994 and 1994 versions of the

Plan and the many, varied legal authority concerning this issue, I find as follows.

First, I find that because Subsection 20.B.2 (a) of the pre-1994 version of the Plan provided that the monthly amount of the PJS benefit included "any amounts computed pursuant to Section 4 of the Plan [the normal retirement pension provision of the Plan]" without any actuarial reduction, even though the participant was retiring at an age which would not normally entitle him or her to the normal retirement pension provided under the terms of the Plan without any actuarial reduction and further states in Subsection 20.B.3 that "[t]he amount calculated in accordance with Subsection 20.B.2(a) shall be payable for the lifetime of the Employee," that, at the very least, the amount of the PJS benefit "computed pursuant to Section 4 of the Plan" (if not the entire PJS benefit) is: (1) a benefit pursuant to which "more is provided. . .than any reasonable actuarial equivalent of the plan's normal retirement benefit" and (2) "a subsidy that continues after retirement." Therefore, the PJS benefit is "a retirement-type subsidy" as that term is used in §§ 204(g) and 411(d)(6). *See Dade*, 68 F.3d at 1562, n.1; S. Rep. No. 575, 98th Cong., 2d Sess. 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

In so holding, I obviously disagree with the Defendants' position that the PJS benefit is not a protected retirement-type subsidy because the Plan provides that "once the employee reached age 65 [the normal retirement age under the Plan], this pre-retirement subsidy ceased, and he or she received only the Plan's 'normal retirement' benefit. It is a key fact that, when the employee reached age 65, he or she was entitled to nothing more than their normal retirement benefit." Defendants' Supporting Brief, p. 6. The difficulty I have with the Defendants' argument is that "Subsection 20.B.3 expressly provides that '[t]he amount calculated in accordance with Subsection 20.B.2(a) shall be payable *for the lifetime of the Employee*,'" not until the participant turned 65.

I further find that the Defendants' argument that an unpredictable contingent event benefit such as the PJS benefit, is not protected until the contingent event occurs, is without merit in that it (and the authority it relied on) reads into the relevant statute a limitation on the protection of retirement-type benefits that simply is not supported by either the statutory language or the legislative history of § 204(g). More specifically, first, no where in plain language of § 204(g) is there any distinction made between "contingent" and "non-contingent" retirement-type subsidy benefits. Second, the legislative history of the amendment to § 204(g) expressly states that the amendment was designed to "protect[ ] the accrual of benefits with respect to participants who have met the requirements for a benefit as of the time a plan is amended *and participants who subsequently meet the preamendment requirements*." *See* S. Rep. No. 575, 98th Cong., 2d Sess. 28, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2574 (emphasis added). Additionally, such a conclusion seemingly would be in direct opposition to the Third Circuit court's view of § 204(g) in *Dade*, *supra*., wherein after noting that the early retirement benefit at issue was a retirement-type subsidy, the court explained, without any limitations, that after the amendment to § 204(g) in 1984, while "a plan sponsor could prospectively eliminate an early retirement benefit by amendment . . . the amendment could not adversely affect the early retirement benefit of a plan participant who satisfied the pre-amendment conditions for the benefit either before or after the amendment" and "[t]hus, if [the plan sponsor] had adopted such an amendment, it would have had to allow those employees who remained in its employ after the amendment to 'grow into' the benefit." *Dade*, 68 F.3d at 1562.

In so holding, I also acknowledge that my finding that the PJS benefit is a retirement-type subsidy subject to the protection of § 204(g) is not consistent with (and indeed is contrary to) the above-discussed IRS General Counsel Memorandum, GCM 39869 (April 6, 1992). In reaching the decision that I did, I gave the IRS' analysis of § 411(d)(6) in GCM 39869 much

consideration. For the above-stated reasons, however, I simply disagree with the IRS' analysis of the issue.

Moreover, I also disagree with the Defendants' contention that the Third Circuit court's decision in *Berger v. Edgewater Steel Co.*, 911 F.2d 911 (3d Cir. 1990), stands for the proposition "that contingent benefits may be eliminated before the contingency occurs." Defendants' Brief, p. 18. Specifically, at issue in *Berger*, *inter alia*, was a benefit that stated that if a Plan participant had met certain age and service requirements and the participant "consider[ed] that it would be in his interest to retire, and the Company consider[ed] that such retirement would likewise be in its interest and it approve[d] an application for retirement under mutually satisfactory conditions, then the participant would be eligible to retire and upon his retirement would be eligible for a special payment and a regular pension." *Id.* at 914 n.2. Three of the *Berger* plaintiffs had announced their intent to retire and had requested the 70/80 retirement benefit and been denied. The plaintiffs argued that said blanket denial constituted an amendment to the Plan that violated § 204(g). The *Berger* court first quoted the section of § 204(g) that provides that "a plan amendment which has the effect of—(A) eliminating or reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." *Id.* The court then quoted the legislative history of the statutory provision that explains:

> [this amendment to § 204(g)] generally protects the accrual of benefits with respect to participants who have met the requirements for a benefit as of the time a plan is amended and participants who subsequently meet the preamendment requirements. The bill does not, however, prevent the reduction of a subsidy in the case of a participant who, at the time of separation from service (whether before or after the plan amendment) has not met the preamendment requirements.

Id. Ultimately, the *Berger* court reasoned:

> [t]his provision of § 204(g) does not apply to this case because none of the [plaintiffs] met the requirements for 70/80 retirement at the time that [defendant company] amended the Plan. This included the requirement that their early retirement be in the mutual interest of both them and the company. Although [defendant company's] blanket denial of requests for 70/80 retirement could be seen as an amendment to the Plan, the instant provision still would not apply because none of the [plaintiffs] met the requirements for 70/80 retirement prior to the time the blanket denial policy was instituted.

Id. As I read the *Berger* decision, at no point does the analysis even infer that "contingent benefits may be eliminated before the contingency arose."

Finally, I also acknowledge the Defendants' argument that I should rely upon a favorable determination by the Internal Revenue Service, the agency responsible for interpreting the Internal Revenue Code, that the Plan as amended in 1994 did not violate 26 U.S.C. § 411(d)(6), the Internal Revenue Code's counter-part statute to § 204(g) and satisfied the requirements for a tax-qualified pension plan, because prior to issuing the favorable determination letter, the IRS had preliminarily asked Defendants "why the elimination of the PJS provision is not a protected benefit," and Defendants had explained to the IRS "that under IRS GCM 39869 and *Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329 (6th Cir. 1988), the PJS benefit is an 'unpredictable contingent event' benefit and not protected."[6] Defendants' Reply Brief, p. 20.

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[6] More specifically, Defendants responded as follows:

> *Elimination of Special Retirement Provision.* The prospective elimination of the special retirement provision is permitted because such benefits are classified as "unpredictable contingent event" benefits

One difficulty I have with this argument is that the conclusion reached by the IRS is unsupported by any analysis of why the Plan, to the extent it amended the definition of a "Permanent Job Separation," did not violate § 411(d)(6). *See Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 469 (7th Cir. 1992) (holding with respect to an IRS determination letter that approved defendants' application for continued qualification of plan under 26 U.S.C. § 401 where the plan contained an amendment that eliminated a COLA provision, that "[g]iven the informal nature of the[ ] letter[ ], the express limitations included in the IRS letter, and the absence of any reasoning to explain the basis for the statements, we do not think that any implication in . . . the[ ] letter[ ] that elimination of the COLA was lawful is entitled to deference."); *Rybarczyk v. TRW, Inc.*, 1997 WL 129296, * 8 (N.D.Ohio March 14, 1997) (holding that where IRS determination letter concluded that plan was qualified but gave no indication that the IRS considered the specific issue involved in the litigation and to the extent that it did, gave no indication of the reasoning behind the determination, court did not find IRS determination letter to be persuasive authority); *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1172 (S.D.Tex. 1991), *aff'd*, 36 F.3d 1308 (5th Cir. 1994) (holding that where IRS determination letter evidenced no investigation or legal analysis of the facts by IRS, the determination letter was due no deference). Moreover, to the

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and, as such, do not become "protected" until the contingent event occurs. In other words, a plan may be amended to eliminate such a benefit with respect to those employees for whom the contingent event—such as a plant shutdown—has not occurred. Please see IRS GCM 39869 (Oct. 2, 1991), which reviews legislative history in reaching this conclusion. We also note that at least one court has concluded that plant shutdown benefits are not "retirement-type subsidies," and for that reason also are not subject to protection. *See Ross v. Pension Plan for Hourly Employees of SKF Industries, Inc.*, 847 F.2d 329 (6th Cir. 1988).

February 12, 1995 letter, p. 8.

extent the IRS relied on the analysis set forth in IRS GCM 39869 as the basis for its determination, I have already held that I disagree with the IRS' interpretation.

Accordingly, because it is not factually disputed that Defendants amended the definition of "Permanent Job Separation" with the effect that said amendment reduced the PJS benefit and that Plaintiff subsequently satisfied all of the pre-amendment conditions for this retirement-type subsidy (age, years of service and termination of the employment with CBS through no fault of his own through lack of work for reasons associated with CBS' business for whom CBS determines there is no reasonable expectation of recall), albeit after the Plan had been amended, I find as a matter of law that when the Defendants amended the definition of Permanent Job Separation they, by plan amendment, decreased an accrued benefit of Plaintiff in violation of ERISA § 204(g).[7] *See also, for example, Harms v. Cavenham Forest Industries, Inc.*, 984 F.2d 686 (5th Cir. 1993) (holding where benefit's eligibility terms involved there being an "involuntary separation" requirement for receiving the benefit as well as the participant having to satisfy certain age and period of service requirements and participants eventually met all of the conditions for receiving the benefit but did not satisfy the "involuntary separation" condition until after the plan had been amended to eliminate the benefit, that the benefit constituted a retirement-type subsidy. Therefore, because the participants met all of the conditions for the benefit, even though the requirement of "involuntary separation" did not occur until after the amendment of the Plan, the benefits were "vested pension benefits that had accrued and could not be reduced or eliminated by subsequent plan amendment").

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[7] Because I found that the PJS benefit is a retirement-type subsidy as that term is used in §§ 204(g) and 411(d)(6), it was not necessary to address Plaintiff's alternate contention that the benefit is "an early retirement benefit" protected under ERISA § 204(g) and therefore, I elect not to address said argument on the merits.

Accordingly, the Plaintiff's Motion for Partial Summary Judgment on the issue of whether Defendants violated 29 U.S.C. § 1054(g) is granted.

STATUTORY PROVISIONS

Internal Revenue Code

26 U.S.C. § 411. Minimum vesting standards

. . . .

(d) Special rules—

. . . .

(6) Accrued benefit not to be decreased by amendment.—

(A) In general.—A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

(B) Treatment of certain plan amendments.—For purposes of subparagraph (A), a plan amendment which has the effect of—

(i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(ii) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfied (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary may be regulations provide that this subparagraph shall not apply to a plan amendment described in clause (ii) (other than a plan amendment having an effect described in clause (i)).

. . . .

26 U.S.C. § 412. Minimum funding standards

. . . .

(l) Additional funding requirements for plans which are not multiemployer plans.—

. . . .

(7) Current liability.—

For purposes of this section—

(A) In general—The term "current liabiiity" means all liabilities to employees and their beneficiaries under the plan.

(B) Treatment of unpredictable contingent event benefits.—

(i) In general—For purposes of subparagraph (A), any unpredictable contingent event benefit shall not be taken into account until the event on which the benefit is contingent occurs.

(ii) Unpredictable contingent event benefit—The term "unpredictable contingent event benefit" means any benefit contingent on an event other than

(I) age, service, compensation, death, or disability, or

(II) an event which is reasonably and reliably predictable (as determined by the Secretary).

. . . .

26 U.S.C. § 415. Limitations on benefits and contributions under qualified plans

. . . .

(b) Limitation for defined benefit plans.—

. . . .

(2) Annual benefit.—

. . . .

(A) In general.—For purposes of paragraph (1), the term "annual benefit" means a benefit payable annually in the form of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions (as defined in sections 402(c), 403(a)(4), and 408(d)(3)) are made.

(B) Adjustment for certain other forms of benefit.—If the benefit under the plan is payable in any form other than the form described in subparagraph (A), or if the employees contribute to the plan or make rollover contributions (as defined in sections 402(c), 403(a)(4), and 408(d)(3)), the determinations as to whether the limitation described in paragraph (1) has been satisfied shall be made, in accordance with regulations prescribed by the Secretary, by adjusting such benefit so that it is equivalent to the benefit described in subparagraph (A). For purposes of this subparagraph, any ancillary benefit which is not directly related to retirement income benefits shall not be taken into account; and that portion of any joint and survivor annuity which constitutes a qualified joint and survivor annuity (as defined in section 417) shall not be taken into account.

Employee Retirement Income Security Program

29 U.S.C. § 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a

national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantial affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee

benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits setting minimum standards of funding, requiring termination insurance.

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other

than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which—

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit

plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

. . . .

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

. . . .

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the account determined under section 1054(c)(2)(B) of this title with respect to the employee's accumulated contribution.

. . . .

29 U.S.C. § 1051. Coverage

This ["Participation and Vesting"] part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

(1) an employee welfare benefit plan;

. . . . .

29 U.S.C. § 1054. Benefits accrual requirements

. . . . .

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of Paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

. . . . .

29 U.S.C. § 1056. Form and payment of benefits

(a) Commencement date for payment of benefits

Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which—

(1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

. . . .

29 U.S.C. § 1081. Coverage

(a) Plans excepted from applicability of this ["Funding"] part

This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than—

(1) an employee welfare benefit plan;

. . . .

29 U.S.C. § 1082. Minimum funding standards

. . . . .

(d) Additional funding requirements for plans which are not multiemployer plans

. . . . .

(7) Current liability

For purposes of this subsection—

(A) In general

The term "current liability" means all liabilities to participants and their beneficiaries under the plan.

(B) Treatment of unpredictable contingent event benefits

(i) In general

For purposes of subparagraph (A), any unpredictable contingent event benefit shall not be taken into account until the event on which the benefit is contingent occurs.

(ii) Unpredictable contingent event benefit

The term "unpredictable contingent event benefit" means any benefit contingent on an event other than—

(I) age, service, compensation, death, or disability, or

(II) an event which is reasonably and reliably predictable (as determined by the Secretary of the Treasury).

. . . . .

29 U.S.C. § 1202. Procedures with respect to continued compliance with Internal Revenue requirements relating to participation, vesting, and funding standards

. . . . .

(c) Extended application of regulations prescribed by Secretary of the Treasury relating to minimum participation standards, minimum vesting standards, and minimum funding standards

. . . .

Regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, and 412 of Title 26 (relating to minimum participation standards, minimum vesting standards, and minimum funding standards, respectively) shall also apply to the minimum participation, vesting, and funding standards set forth in parts 2 and 3 of subtitle B of subchapter I of this chapter. Except as otherwise expressly provided in this chapter, the Secretary of Labor shall not prescribe other regulations under such parts, or apply the regulations prescribed by the Secretary of the Treasury under sections 410(a), 411, 412 of Title 26 and applicable to the minimum participation, vesting, and funding standards under such parts in a manner inconsistent with the way such regulations apply under sections 410(a), 411, and 412 of Title 26.

29 U.S.C. § 1322. Single-employer plan benefits guaranteed

(a) Nonforfeitable benefits

Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee, in accordance with this section, the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under a single-employer plan which terminates at a time when this subchapter applies to it.

. . . .

FEDERAL REGULATIONS

26 C.F.R. § 1.411(d)-4. Section 411(d)(6) protected benefits

Q-1: What are "section 411(d)(6) protected benefits"?

A-1: . . .

(d) *Benefits that are not section 411(d)(6) protected benefits*. The following benefits are examples of items that are not section 411(d)(6) protected benefits:

(1) Ancillary life insurance protection;

(2) Accident or health insurance benefits;

(3) Social security supplements described in section 411(a)(9), except qualified social security supplements as defined in § 1.401(a)(4)-12;

(4) The availability of loans (other than the distribution of an employee's accrued benefit upon default under a loan);

(5) The right to make after-tax employee contributions or elective deferrals described in section 402(g)(3);

(6) The right to direct investments;

(7) The right to a particular form of investment (e.g., investment in employer stock or securities or investment in certain types of securities, commercial paper, or other investment media);

(8) The allocation dates for contributions, forfeitures, and earnings, the time for making contributions (but not the conditions for receiving an allocation of contributions or forfeitures for a plan year after such conditions have been satisfied), and the valuation dates for account balances;

(9) Administrative procedures for distributing benefits, such as provisions relating to the particular dates on which notices are given and by which elections must be made; and

(10) Rights that derive from administrative and operational provisions, such as mechanical procedures for allocating investment experience among accounts in defined contribution plans.

26 C.F.R. § 301.7805-1. Rules & Regulations.

(a) Issuance. The Commissioner [of the Internal Revenue Service], with the approval of the Secretary [of the Treasury], shall prescribe all needful rules and regulations for the enforcement of the Code (except where this authority is expressly given by the Code to any person other than an officer or employee of the Treasury Department), including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

26 C.F.R. § 601.201. Rulings and determination letters.

(a) General practice and definitions.

(3) A "determination letter" is a written statement issued by a district director in response to a written inquiry by an individual or an organization that applies to the particular facts involved, the principles and precedents previously announced by the National Office. A determination letter is issued only where a determination can be made on the basis of clearly established rules as set forth in the statute, Treasury decisions, or regulation, or by a ruling, opinion, or court decision published by the Internal Revenue Bulletin. Where such a determination cannot be made, such as where the question presented involves a novel issue or the matter is excluded from the jurisdiction of a district

director by the provisions of paragraph (c) of this section, a determination letter will not be issued.

. . . .

Internal Revenue Service (I.R.S.)

General Counsel Memorandum

Date Numbered: April 6, 1992

Publication Date: April 20, 1992

Section 401 — Qualified Pension, Profit-Sharing, and Stock Bonus Plan

401.00-00 Qualified Pension, Profit-Sharing, and Stock Bonus Plan

401.01-00 Impossibility of Diversion

401.01-01 Exclusive Benefit of Employees or Their Beneficiaries

Section 411 — Minimum Vesting Standards

411.00-00 Minimum Vesting Standards

411.03-00 Accrued Benefit Requirements

CC:EE:TR45-216-90
Br4:TGSchendt

JOHN E. BURKE
Assistant Commissioner (Employee Plans and Exempt Organizations)

Attention: Director, Employee Plans Technical and Actuarial Division

In a memorandum dated January 30, 1990, the Director, Employee Plans Technical and Actuarial Division, requested the concurrence or comments of this office with respect to technical advice requests submitted on the above captioned cases.

ISSUES

1. Whether shutdown benefits may be provided in a qualified pension plan?

2. If shutdown benefits may be provided in a qualified plan, are they accrued benefits that are protected under section 411(d)(6) and subject to the minimum survivor annuity requirements under sections 401(a)(11) and 417?

CONCLUSIONS

Issue 1.

Whether shutdown benefits may be provided in a qualified pension plan is not determined solely by the event that triggers the payment of the benefit but rather by the terms of the benefit including the form of the benefit that is being provided. Shutdown benefits that are retirement-type benefits may be provided under a qualified pension plan. For example, benefits that become payable because of a plant shutdown and are in the form of annuity payments that continue after retirement age are retirement-type subsidies and thus may be provided under a qualified pension plan.

Shutdown benefits that are ancillary benefits (i.e., social security supplements) may also be provided. They must satisfy any necessary requirements to be considered an ancillary benefit (e.g., a social security supplement must satisfy the requirements of section 411(a)(9) of the Code and section 1.411(a)- 7(c)(4) of the regulations).

Shutdown benefits that are layoff or severance type benefits may not be provided in a qualified pension plan.

Issue 2.

Shutdown benefits that are retirement-type benefits, and not ancillary benefits, become accrued benefits and therefore are protected benefits under section 411(d)(6) upon the occurrence of the event that triggers the right to payment of benefits (i.e.,

the contingent event). These benefits are subject to the minimum survivor annuity requirements under sections 401(a)(11) and 417 and therefore must be provided in the form of a qualified joint and survivor annuity ("QJSA") and provide for a qualified preretirement survivor annuity ("QPSA").

Shutdown benefits that are ancillary benefits are not accrued benefits and therefore are not protected under section 411(d)(6). These benefits need not be provided in the form of a QJSA or provide for a QPSA.

FACTS

Although your request resulted from technical advice requests regarding shutdown benefits provided by two employers, you have indicated that our response should address whether qualified pension plans may generally provide for shutdown benefits and, if so, whether shutdown benefits are protected benefits under section 411(d)(6).

Many pension plans provide for shutdown benefits to participants. These benefits become available to plan participants upon the occurrence of a specific event described in the plan that causes the participants' employment to terminate as a result of a change in the organization or operation of the employer. For example, the complete and permanent closure of a plant, facility or division of the employer, or the elimination of particular job categories are types of events that may cause the termination of employment and for which the plan may provide the affected participants with additional benefits. The availability of these benefits may be offered to participants either on an ongoing basis or only for a limited period of time, i.e., a "window period."

ANALYSIS

Issue 1.

A. Generally, a qualified pension plan, within the meaning of section 401(a), may provide retirement-type benefits and

ancillary benefits to participants.[1] It may not, however, provide for benefits not customarily included in a qualified pension plan such as layoff benefits.

1. Retirement and ancillary benefits.

Section 1.401-1(b)(l)(i) of the regulations provides that a qualified pension plan, within the meaning of section 401(a), is a plan maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to its employees over a period of years, usually for life, after retirement. Retirement benefits are generally measured by, and based on such factors as years of service and compensation received by the employees.

Section 1.401-1(b)(l)(i) further provides that a qualified pension plan may also offer certain other benefits that are not retirement-type benefits, i.e., ancillary benefits.[2] For example,

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[1] This GCM concludes that shutdown benefits may be in a qualified pension plan only if they are either retirement-type benefits or ancillary benefits. It should be noted that some permissible benefits may be both ancillary benefits and retirement-type benefits. For example, a qualified disability benefit as defined in section 411(a)(9) is both an ancillary benefit and a retirement-type benefit.

[2] While section 401 and the regulations thereunder do not provide for a complete list of ancillary benefits that may be included in a qualified pension plan, other Code sections list types of benefits that are ancillary benefits which may be offered under a qualified pension plan.

Section 411 distinguishes between "accrued benefits" i.e., pension or retirement benefits, which are subject to vesting requirements, and ancillary benefits, which are not. Section 1.411(a)-7(a)(l)(ii) provides that ancillary benefits are those benefits not directly related to retirement benefits such as medical expenses, qualified disability benefits, social security supplements, life insurance benefits payable as a lump sum, incidental death benefits, or medical benefits described in section 401(h).

Section 415 likewise distinguishes between the annual benefit subject to the 415 limits and ancillary benefits which are not. Section

a qualified pension plan may provide for the payment of disability benefits, social security supplements, life insurance benefits payable as a lump sum, incidental death benefits, or medical benefits described in section 401(h).[3]

2. Layoff/severance benefits.

Section 1.401-1(b)(1)(i) also states that a qualified pension plan may not provide for the payment of benefits not customarily included in a qualified pension plan such as layoff benefits or benefits for sickness, accident, hospitalization or medical expenses (except as described in section 401(h)).

Although layoff benefits are not defined in the Code or regulations, generally they are perceived to be event-based benefits that are provided for a limited period of time and are intended to be a short-term replacement of the employee's income. The event that triggers this short-term benefit is usually a permanent or temporary layoff or a reduction in the employer's workforce. These benefits are similar to severance benefits as defined under Title I of ERISA. See 29 C.F.R. section 2510.3-2(b).[4] For example, a layoff benefit may be offered for

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1.415-3(c)(2)(ii) provides that when computing any adjustment to the applicable limitations on benefits, the value of benefits that are not directly related to retirement (such as pre-retirement disability benefits and death benefit and post- retirement medical benefits) are not taken into account.

[3] Section 1.401-14(a) provides that under section 401(h) a qualified pension plan may make provision for the payment of sickness, accident, hospitalization, and medical expenses for retired employees, their spouses, and their dependents.

[4] For illustration purposes only and not controlling under Title II of ERISA, 29 C.F.R. section 2510.3-2(b) provides that for purposes of Title I of ERISA, an arrangement shall not be deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that: (1) such payments are not contingent, directly or indirectly,

a 6-month or 1-year period following a reduction in workforce. The form of this benefit may be either a lump-sum payment or monthly or quarterly payments.

B. Shutdown benefits may be offered either as layoff, ancillary or retirement-type benefits.

Shutdown benefits are event-based benefits that become available to individuals upon the occurrence of an event that causes an individual's employment to change. The characteristics of shutdown benefits may vary depending upon the purpose the employer hopes to achieve by providing the benefit.

Some shutdown benefits are provided in a form similar to severance benefits. They are short-term in nature and are a supplement or replacement of the participant's income during the period of unemployment. These benefits are provided for a limited period of time after the termination of the individual's employment and the amount of the benefit is generally determined either as a flat amount or as a multiple or fraction of the individual's annual compensation. For example, these benefits may be paid for a period equal to the number of weeks that an individual is out of work (e.g., $500 a week for each week unemployed) up to a maximum number of weeks, or for a definite period of time regardless of the length of the period of unemployment.

Other shutdown benefits are provided in the form of ancillary benefits. For example, a social security supplement as defined in section 411(a)(9) may be offered. As such, this benefit would

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upon the employee's retirement; (2) the total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and (3) all such payments to any employee are completed generally within 24 months after the termination of the employee's service.

commence before benefits payable under the Social Security Act become payable, not exceed such social security benefits, and terminate when such social security benefits commence. See Treas. Reg. section 1.411(a)-7(c)(4).

Alternatively, shutdown benefits may continue beyond normal retirement age, i.e., retirement-type benefits. Generally, shutdown benefits provide an incentive to employees who are at or near normal retirement age to retire at the time of the plant shutdown. For example, an employer may reduce the age or service eligibility requirements for the normal retirement benefit, or may supplement the accrued benefit of the individual.

C. The determination of whether a shutdown benefit may be provided in a qualified pension plan should focus on the form of benefit.

As noted, shutdown benefits may be provided by an employer for a number of reasons. For example, if the employer is concerned that the employees may need some time to find a new position, the employer may want to provide each employee with a short-term replacement of income for several months or more. Alternatively, if the employees are near retirement age, the employer may prefer to supplement their retirement benefits.

Because the characteristics of shutdown benefits vary so widely among employers, it is not possible to state the general rule to determine the permissibility of providing these benefits in a qualified pension plan. Rather, to make a determination as to whether a shutdown benefit may be provided in a qualified pension plan, the form in which the benefit is provided must be examined on a case by case basis.

1. Shutdown benefits that are in the form of a layoff or severance benefit may not be provided in a qualified pension plan.

Some plans provide for shutdown benefits in the form of either layoff or severance benefits as previously noted. These benefits are event-based and result from either the temporary or permanent termination of employment.

Under section 1.401-1(b)(1)(i), shutdown benefits that are provided as layoff or severance benefits are not permissible benefits under a qualified pension plan. These benefits are not ancillary benefits nor retirement-type benefits.

2. Shutdown benefits that are in the form of an ancillary benefit may be provided in a qualified pension plan.

As previously discussed, the Code and regulations provide that certain nonretirement-type benefits may be provided in a qualified pension plan if they are considered ancillary benefits. For example, a qualified pension plan may offer an incidental death benefit, a social security supplement as defined in section 411(a)(9) or a disability benefit to participants. These benefits, however, must satisfy any additional requirements that are necessary to be considered ancillary benefits.

Accordingly, if a shutdown benefit is in the form of an ancillary benefit and satisfies any necessary requirements to be considered an ancillary benefit it may be provided in a qualified pension plan.[5]

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[5] Treasury regulation section 1.401(a)(4)-4(a) provides that, in general, the availability of benefits, rights, and features provided under a plan must not discriminate in favor of highly compensated employees. This section further provides that the benefits, rights, and features subject to this requirement are all optional forms of benefits, ancillary benefits, and other rights and features available under the plan. Section 1.401(a)(4)-4(e)(2) defines the term "ancillary benefit" to include shutdown benefits not protected under section 411(d)(6). Accordingly, this GCM is consistent

3. Shutdown benefits that are in the form of a retirement-type benefit may be provided in a qualified pension plan.

The provision of shutdown benefits in the form of a retirement-type benefit in a qualified pension plan was contemplated in the legislative history of the Retirement Equity Act of 1984 ("REA") and the Omnibus Budget Reconciliation Act of 1987 ("OBRA '87"). See Retirement Equity Act of 1984, P.L. 98-397, 98 Stat. 1426 (1984); Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 101 Stat. 1330 (1987).

The legislative history of section 301 of REA, which amended section 411(d)(6), added the term "retirement-type subsidy" and discussed its intended meaning by stating that "a subsidy that continues after retirement is generally to be considered a retirement-type subsidy" and therefore "a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a shutdown benefit (that does not continue after retirement age) will not be considered a retirement-type subsidy." S. Rep. No. 575, 98th. Cong., 2d Sess. 30 (1984) emphasis added. This language suggests that shutdown benefits that continue after retirement age are retirement-type benefits and therefore may be provided in a qualified pension plan.

Section 412(1), as added by section 9303(a)(1) of OBRA '87, provides for additional funding requirements for "unpredictable contingent event benefits." In discussing the meaning of this term, the legislative history states that these benefits are "contingent on an event other than age, service, compensation, death, or disability, or an event which is reasonably predictable

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with these regulations in providing that shutdown benefits must be offered either in the form of a retirement-type or an ancillary benefit to be included as a benefit in a qualified pension plan.

(as determined by the Secretary)" and includes "benefits that depend on contingencies that, like facility shutdowns or reductions or contractions in the workforce, are not reliably and reasonably predictable. This category is not limited to events that are similar to shutdowns or reductions in [work] force." S. Rep. No. 63, 100th Cong., 1st Sess. 171-172 (1987). See also H.R. Rep. No. 391, 100th Cong., 1st Sess. 987 (1987) which provides similar language. It is clear from the legislative history that the special funding rules for unconditional contingent event benefits apply to shutdown benefits.

These legislative histories suggest that a shutdown benefit that is in the form of a retirement-type benefit may be provided in a qualified pension plan. These legislative histories, however, do not suggest that a shutdown benefit that is in a form other than a retirement-type benefit, e.g., a severance benefit, may also be provided in a qualified pension plan.

Issue 2.

A. Under section 411(d)(6), an accrued benefit is a protected benefit and therefore the amount of the accrued benefit may not be decreased or eliminated.

Section 411(d)(6) provides that a qualified pension plan shall not be treated as satisfying section 411 and therefore is not qualified under section 401(a) if the accrued benefit of a participant is decreased or eliminated.

Sections 411(a)(7) and 1.411(a)-7(a)(1) define the term accrued benefit to be the annual benefit commencing at normal retirement age or, where the plan does not provide an annual benefit commencing at normal retirement age, an annual benefit commencing at normal retirement age which is the actuarial equivalent of the accrued benefit determined under the plan. See also I.R.C. § 411(c)(3); Treas. Reg. § 1.411(c)-5. Section 1.411(a)-7(a) further provides that an accrued benefit only refers to a pension or a retirement benefit and therefore does not include ancillary benefits not directly related to retirement

benefits such as payment of medical expenses, disability benefits, incidental death benefits, social security supplements, or medical benefits described in section 401(h).

Section 1.411(d)-4, Q&A-1:(a) provides a list of benefits that are section 411(d)(6) protected benefits and that may not be decreased or eliminated. Included among these protected benefits are retirement-type subsidies. See Treas. Reg. section 1.411(d)-4, Q&A- 1:(a)(2). As discussed earlier, the legislative history of REA which added the term "retirement-type subsidy" indicates that shutdown benefits that continue after retirement-age are retirement-type subsidies. See S. Rep. No. 575, 98th. Cong., 2d Sess. 30 (1984).

Section 1.411(d)-4, Q&A-1:(d) provides a list of certain benefits that are not section 411(d)(6) protected benefits. Among this list of benefits are ancillary type benefits such as social security supplements and ancillary life insurance protection; and accident and health insurance benefits.

Thus, if provided as retirement-type subsidies, shutdown benefits are accrued benefits and therefore protected under section 411(d)(6). Shutdown benefits, however, that are provided as ancillary benefits are not protected benefits under section 411(d)(6).

B. Shutdown benefits that are retirement-type benefits, and are not ancillary benefits, become an accrued benefit and therefore protected under section 411(d)(6) upon the occurrence of the event that triggers the right to the benefits (i.e., the contingent event). This is consistent with the treatment of shutdown benefits as unpredictable contingent event benefits for purposes of the funding requirements under section 412.

In determining a defined benefit plan's current liability for purposes of the funding requirements under section 412, unpredictable contingent event benefits are not taken into account until the event on which the benefit is contingent occurs. See I.R.C. section 412(1)(7)(B).

The legislative history of section 412(1) is clear that shutdown benefits are unpredictable contingent event benefits. See H.R. Rep. No. 391, 100th Cong., 1st Sess. 987 (1987); S. Rep. No. 63, 100th Cong., 1st Sess. 171-172 (1987). Accordingly, because shutdown benefits are considered to be unpredictable contingent event benefits under section 412(1), a qualified pension plan is not required to fund for shutdown benefits until the triggering event occurs.

Thus, treating a shutdown benefit as an accrued benefit and therefore as a section 411(d)(6) protected benefit at the time that the triggering event occurs is consistent with the treatment of this benefit as an unpredictable contingent event benefit for purposes of the additional funding requirements under sections 412(1) and 412(c)(7).

The plan's definition of the shutdown benefit will generally determine the occurrence of the contingent event. For example, a plan may provide that shutdown benefits will be offered to all affected participants "upon the resolution by the board of directors to close a facility." In this case the resolution by the board is the event that triggers the shutdown benefit. Other plans provide that benefits will be offered to all terminated participants "upon notice to plan participants of a plant shutdown." Still other plans provide that the "actual termination of operations at a particular facility" is the triggering event. The plan's description of a specific event is also the triggering event for determining when the shutdown benefit becomes a section 411(d)(6) protected benefit.

C. If offered as a retirement-type subsidy in a qualified pension plan, shutdown benefits are accrued benefits that must be provided for in the form of a qualified joint and survivor annuity ("QJSA") and provide for a qualified preretirement survivor annuity ("QPSA").

Section 401(a)(11)(A)(i) provides that in the case of a qualified pension plan, the accrued benefit of a participant who

does not die before the annuity starting date must be provided in the form of a QJSA. Section 1.401(a)-20, Q&A-17 provides that a plan must permit a participant to receive a distribution in the form of a QJSA when the participant attains the earliest retirement age under the plan (i.e., the earliest age that a participant could separate from service and receive a distribution).

Section 401(a)(11l)(A)(ii) provides that in the case of a qualified pension plan, the surviving spouse of a vested participant who dies before the annuity starting date must be provided a QPSA.

For purposes of section 411, a retirement-type subsidy is an accrued benefit. Therefore, as a retirement-type subsidy, shutdown benefits must be provided in the form of a QJSA and provide for a QPSA. Section 411 does not apply to ancillary benefits however, and thus a shutdown benefit that is an ancillary benefit need not be provided in the form of a QJSA and provide a QPSA.

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